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1934.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1934.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C.1,

AND

PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON.

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1934.

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Page	*line*	*for*	*read*
12	footnote (2)	6 Q. B. 165	(1880) 6 Q. B. D. 165
25	footnote (1)	44	441
72	17	years	months

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1934, will be as follows :—

In the First Series,
[1934] Ch.

In the Second Series,
[1934] 1 K. B. [1934] 2 K. B. [1934] P.

In the Third Series,
[1934] A. C.

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE CHAMPION.

1933

Oct. 5.

Shipping—Collision—County Court Admiralty Jurisdiction—Dumb Barge in Tow of Tug—"Ship"—"Vessel . . . . not Propelled by Oars"—County Courts Admiralty Jurisdiction Act, 1868 (31 *&* 32 *Vict., c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 *&* 33 *Vict., c.* 51), *s.* 4—*Admiralty Court Act*, 1861 (24 *Vict., c.* 10), *s.* 2.

While in tow of a tug, the plaintiffs' dumb barge, which was fitted with rowing chocks and a rudder, was brought into collision with the defendants' tug. The plaintiffs brought an action in respect of the damage on the Admiralty side of the City of London Court, and the defendants moved to set aside the proceedings on the ground that the barge was not a ship and that accordingly the Court had no jurisdiction to entertain the action.

By s. 2 of the Admiralty Court Act, 1861, "ship" includes "any description of vessel used in navigation not propelled by oars." By s. 3, sub-s. (3), of the County Courts Admiralty Jurisdiction Act, 1868, any County Court having Admiralty jurisdiction shall have jurisdiction to try "any claim for damage to cargo, or damage by collision." By s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, it is provided that s. 3 of the Act of 1868 "shall extend and apply to all claims for damage to ships, whether by collision or otherwise . . . . "

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The judge held that as at the material time the barge was not being propelled by oars she was to be regarded as a ship and that accordingly the Court had jurisdiction to entertain the claim. The defendants appealed.

Held, that the appeal failed; (*a*) per Bateson J. (Sir Boyd Merriman, Pres., dissenting), on the ground that the decision of the Court below that the barge was to be regarded as a ship was right; but (*b*) (per curiam), that, even if the barge was not to be regarded as a ship, the decision could be supported on a ground not argued in the Court below, viz., that the old Court of Admiralty would have had jurisdiction to try a case of collision between two vessels in which one of the vessels involved was a ship, that (subject to a pecuniary limitation) the same jurisdiction was conferred on County Courts by the Act of 1868, and that the Act of 1869 merely enlarged the jurisdiction to include cases of damage to ships caused otherwise than by collision and did not restrict the words of s. 3 of the earlier Act.

APPEAL by the defendants, the owners of the tug *Champion*, from a decision of the judge of the Mayor's and City of London Court (Judge Shewell Cooper), sitting in Admiralty, that he had jurisdiction to entertain an action brought by the owners of the dumb barge *James* in respect of damage by collision.

The case arose out of a collision between the *James* and the *Champion* in Bow Creek on December 20, 1932. The *James*, which at the time of the collision was in tow of the tug *Weybridge*, was a canal barge, 77 feet 8 inches long, fitted with rowing chocks and a rudder, and the defendants, who had entered an appearance under protest, took out a summons to set aside the proceedings on the ground of want of jurisdiction, because, in their contention, the *James* was not a "ship."

By s. 2 of the Admiralty Court Act, 1861, "ship" shall include "any description of vessel used in navigation not propelled by oars."

By s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, "any County Court having Admiralty jurisdiction shall have jurisdiction . . . . to try . . . . (3.) . . . . any claim for damage to cargo, or damage by collision."

By s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, s. 3 of the Act of 1868 "shall extend and apply to all claims for damage to ships, whether by collision or otherwise . . . ."

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Judge Shewell Cooper held that the barge, which per se was not a " ship " within the definition in the Act of 1861, when in tow of a tug was not a vessel " propelled by oars " ; she was a vessel propelled otherwise than by oars ; that accordingly she was a ship at the material time ; and that the action could be brought on the Admiralty side of the Court's jurisdiction.

The defendants appealed.

R. F. Hayward for the appellants. Under s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, Admiralty jurisdiction is limited, in cases of collision, to damage caused to vessels that are " ships " ; the *James* was not a " ship," she was an ordinary dumb barge normally propelled by oars. It is immaterial that at the time of the collision she was being towed ; all classes of vessels are towed from time to time, but they do not thereby change their general character. The ratio decidendi in *The Harlow* (1) was not that the barges were ships because they were in tow but because they were not by construction or usage propelled by oars. They were heavy coal barges similar, in that they had no means of propulsion, to the barge in *The Mac* (2), which always had to be towed and was held to be a ship under s. 458 of the Merchant Shipping Act, 1854, for purposes of salvage. In *Everard* v. *Kendall* (3) where both vessels in collision were dumb barges, it was held that a county court had no jurisdiction as the vessels were not ships, although at the time of the accident neither was in fact being propelled by oars, they were both alongside a wharf.

[BATESON J. The Act of 1868 merely says " damage by collision," it does not mention " ships."]

In *Everard* v. *Kendall* (3), Brett J. said that he was of opinion that the collisions spoken of in the Act of 1868 meant " collisions between vessels propelled otherwise than by oars."

[SIR BOYD MERRIMAN, PRES. Some expressions in the judgments in *Everard* v. *Kendall* (3) go too far ; neither vessel was a ship in that case.]

(1) [1922] P. 175 ; 15 Asp. M. L. C. 498. (2) (1882) 7 P. D. 126.
(3) (1870) L. R. 5 C. P. 428.

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In *The Zeta* (1), the plaintiffs' vessel was a ship which was damaged against the defendant's pier; had she been a dumb barge the decision of the House of Lords, it is submitted, would have been different, and it does not affect the argument founded on *Everard* v. *Kendall.* (2) In *The Upcerne* (3), a case of damage by a vessel, which was undoubtedly a ship, to a gas buoy, the Divisional Court held that the county court had no jurisdiction in Admiralty to entertain the claim and said: "In following the decision in *The Normandy* (4) we are fixing a clear line, I think, for the jurisdiction of the county courts. It will not be necessary for them to ask themselves a question as to what kind of object this or that is, with which a ship comes in contact. The line drawn for their jurisdiction in cases of collision is such that they will only have to ask themselves whether it is a collision, as described in *The Normandy* (4), between ships." In *The Lighter No.* 3 (5), where a lighter was lashed alongside a tug, it was held, as regards the question of her carrying lights, that she was "a vessel used in navigation" under s. 742 of the Merchant Shipping Act, 1894, but there was no decision that she was to be regarded as a "ship."

[Reference was also made to *The Mudlark* (6) and *The Norfolk Coast.* (7)]

Kenneth Carpmael for the respondents. The judge of the City of London Court was right in his conclusion that the barge was to be regarded as a ship. The reasoning in *Ex parte Ferguson* (8) supports that view; she was certainly a ship for purposes of navigation: *The Lighter No.* 3. (5) But, even if she were not a ship, the decision of the Court below that there was jurisdiction to entertain the action can be supported on the ground that where one of the vessels in collision is a ship the provisions of the County Courts Admiralty Jurisdiction Acts are satisfied. The old Court of Admiralty would have had jurisdiction in such a case, and, subject only to a pecuniary

(1) [1893] A. C. 468.
(2) (1870) L. R. 5 C. P. 428.
(3) [1912] P. 160, 167.
(4) [1904] P. 187.
(5) (1902) 18 Times L. R. 322.
(6) [1911] P. 116.
(7) (1922) 11 Ll. L. R. 228.
(8) (1871) L. R. 6 Q. B. 280, 290.

limit, the same jurisdiction was transferred to county courts: see the judgment of Lopes L.J. in *Reg.* v. *Judge of City of London Court* (1), see also *The Zeta* (2), where the plaintiffs' ship was damaged by contact with a pierhead. Sect. 4 of the Amending Act of 1869, which was an extending and not a restrictive section, does not cut down the jurisdiction which county courts already had, but merely extends the jurisdiction to cases of damage to ships caused otherwise than by collision. In *Everard* v. *Kendall* (3) neither vessel was a ship; in *The Normandy* (4) and *The Upcerne* (5) the objects collided with were not vessels at all, and these cases are no authority for the proposition that a county court having Admiralty jurisdiction cannot entertain an action in respect of a collision between two vessels one of which at least is a ship. [Reference was also made to *The Malvina* (6) and *Reg.* v. *Judge of City of London Court.* (7)

Hayward in reply. Even if this action could have been brought in 1868, after 1868 the collision must be between "ships." The Act of 1869 was an amending but not an extending Act.

[SIR BOYD MERRIMAN, PRES. On your argument it was a restricting Act.]

If the respondents are right the statement of Sir Samuel Evans in *The Upcerne* (5) that the line drawn for the jurisdiction of county courts is collision "between ships" is wrong, and so is the reasoning and the opinion of Brett J. in *Everard* v. *Kendall.* (3) The dicta of Lord Macnaghten and Lord Herschell in *The Zeta* (2) were obiter and are in conflict with the express words of the Act of 1869.

THE PRESIDENT (SIR BOYD MERRIMAN). This is an appeal from the learned judge of the City of London Court, sitting in Admiralty, and, as the case was opened, it appeared to raise one very interesting point. But as the argument has developed

(1) [1892] 1 Q. B. 273, 300.
(2) [1893] A. C. 468.
(3) L. R. 5 C. P. 428.
(4) [1904] P. 187.
(5) [1912] P. 160.
(6) (1862) Lush. 493.
(7) (1882) 8 Q. B. D. 609.

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it is apparent that it raises two very interesting points, one of which is of vital importance on the question of the general jurisdiction of county courts in Admiralty. Unfortunately, on the latter point, we have no assistance from the learned judge below, because the point was not developed before him, but it was a point which is clearly open to the respondents who can always defend a judgment by any point of law which is open to them.

The matter arises in this way. The defendants' tug *Champion* ran into—I deliberately avoid the use of the word " collided," for reasons which will appear later—ran into the plaintiffs' dumb barge *James* at the time when the latter was in tow of a steam tug. The question is whether, in those circumstances, the judge had jurisdiction to hear the claim. He decided that he had, on the only point which was argued before him—namely, that at the time of the collision the *James* was a ship. Whatever her ordinary character might be at other times, at the time in question, it was argued, she was a ship, because, being in tow of a steam tug it could not be said of her at that moment that she was " a vessel used in navigation propelled by oars." In other words, she was at that time " a vessel used in navigation not propelled by oars," as she was propelled by a tug. On that ground the learned judge decided that he had jurisdiction as the claimant vessel was a " ship."

But in the course of the discussion before us, it has become apparent that there is a wider and more fundamental question, which, as I have said, was not dealt with in the Court below. That question is this :—whether, even assuming that this vessel retained her character of a barge propelled by oars, and never became a ship at all by reason of the fact that she was at the moment in tow, nevertheless her owners still have the right to claim under the Admiralty jurisdiction of that Court on the following ground—namely, that the damage was inflicted by a vessel which it is conceded was a ship ; that therefore the old Court of Admiralty would have had jurisdiction, and that it is that jurisdiction, at any rate, which has been transferred to the county courts by the various Statutes to which reference has been made.

Mr. Carpmael for the respondents submitted that it was immaterial whether he could support the decision on the basis on which the learned judge gave judgment, and that he was entitled to support it on the ground that, assuming the judge was wrong in saying this vessel was a ship, nevertheless she was a vessel; she collided with another vessel which was admittedly a ship: that would have given the old Admiralty Court jurisdiction and, therefore, gives the county court jurisdiction. As I have said, that is a much wider and the more general question of the two, and we are both of opinion—for reasons which I will state presently—that Mr. Carpmael's submission in that respect is right. In a sense, therefore, it is immaterial what view we take on the matter which was discussed in the Court below, and on which the judge has given a very carefully considered judgment. But, out of respect to him (because it is not his fault that the other matter was not argued and discussed), and also because, unfortunately, my learned brother and I do not see this point in the same way, I will state my reasons for disagreeing both with the learned judge, and with my brother Bateson. I may say that, having regard to the fact that both of them are infinitely more experienced in these matters than I am, I express my opinion on the subject with the greatest diffidence; but as I have arrived at a definite conclusion, I think I ought to express it.

I will deal first with the question that was argued in the Court below. It comes to this: it is conceded, that at many other times this barge was "a vessel propelled by oars." But it is said that because on the occasion in question she was in tow, and there was no question of propulsion by oars, she was at all material times "a vessel not propelled by oars." That really raises this very interesting question whether, quite apart from any physical change in the structure of the vessel—a conversion say into steam, or anything of that sort, about which I think there could not be any possible question—the mere fact that a dumb barge habitually or frequently propelled by oars is at a given moment being towed, or is not at a given moment being propelled by oars, enables her to change her character or her description within the definition.

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I have come to the conclusion, after reading all the various cases which have been fully and clearly cited before us, that jurisdiction cannot be founded upon a chameleon-like change of that sort. In my opinion, the authorities which have been cited before us show that the question turns on what was the general character or description of the vessel, and not upon what was her particular user at a given moment. To take an extreme case, I do not think that anybody could seriously suggest that, given a vessel which is habitually propelled by oars, it can possibly matter that at the given moment she is either tied up, or takes her oars inboard, or does something which prevents it being possible to say that at that given moment she is propelled by oars. That, of course, would be an extreme and absurd illustration. But, in my view, what we have to find is, whether this vessel, speaking generally, has the description and character of an oar-propelled vessel, and if so can it make any difference to her general character of an oar-propelled vessel that, at a given moment, she is in charge of a tug? Now I confess that when the learned judge's judgment was first read to us I thought that the cases which he cited, and in particular *The Harlow* (1), would tend to show that the fact that a vessel normally propelled by oars was being towed changed her character. After considering those cases I have come to the conclusion that their effect is exactly the other way, and I think this can be illustrated without going through all the cases by considering two of those which have been cited to us.

I take first *Ex parte Ferguson* (2), on which Mr. Carpmael relied in support of the judgment. The point in that case, it is sufficient to say, was whether a certain fishing coble was a ship in spite of the fact that it was conceded that from time to time she was propelled by oars. In other words, what was said was that it could not be contended that this vessel was not propelled by oars, because from time to time, in the ordinary course, she was propelled by oars." Blackburn J., as he then was, said: "It is said on behalf

(1) [1922] P. 175; 15 Asp. M. L. C. 498. (2) L. R. 6 Q. B. 280, 290.

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of the master and mate that the fishing coble cannot be a 'ship.' She is twenty-four feet long; she is not entirely decked over; she has two masts and a rudder which are removable, and she may be propelled by four oars. She goes out well to sea; and though the oars are used to get her out of harbour, they are merely auxiliary to the use of sails. It is said on behalf of the Board of Trade that is a 'ship.' The chief argument against that proposition is by referring to the interpretation clause (s. 2 of 17 & 18 Vict. c. 104), which says, '"ship" shall include every description of vessel used in navigation not propelled by oars.' And the argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship.' I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purpose of this Act."

Now there they were deciding that the vessel was a ship though, from time to time, propelled by oars, but, in substance, she was a sailing ship, and that fortifies me in the conclusion that what one has to look at is the substance of the matter, permanently, and not what is the user at any given moment—not whether a thing which is generally propelled up and down the Thames by oars happens at the moment not to be using her oars but to be in tow of a tug. In my view one must look at what is her general character or description. I think that is what Blackburn J. stated—that just as a sailing ship

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cannot be prevented from being a ship by saying that the occasional use of oars compels the Court to say that she cannot be a vessel not propelled by oars, so here it is impossible to say that a vessel which is designed to be, and is, in fact, generally speaking, a typical dumb barge propelled by oars, becomes a ship because at a given moment she is in tow of a tug.

I now come to *The Harlow* (1), which seems to me to be extremely important in this connection. The learned judge dealt with that case as decisive in favour of the plaintiffs. He says: "In *The Harlow* (1), dumb barges in tow of a tug were held to be ships within s. 742 of the Merchant Shipping Act, 1894, for the purpose of limiting their liability." That is quite true; but Mr. Hayward has assisted us very much as to the real facts in that case, and when the record—for which we sent—is examined it is clear that the point in that case was that although the vessels in question were barges, one of them was not even fitted out for propulsion by oars, and it was proved by affidavit, produced before this Court and admitted, that the other four even if they were in a sense constructed for propulsion by oars never had been, and never were, used otherwise than in tow of a tug. At any rate they never were used for propulsion by oars. It appears from the report in Aspinall's Reports that that was the crux of the matter and, indeed, it must have been, because if all that had to be said was that whatever their general character, they were, at the moment, in tow of a tug—that was common ground—there was no need to proceed any further. But I am quite satisfied that it was a cardinal issue in that case that those particular barges were not, in the general sense, barges propelled by oars. When the President's judgment is read, although it is true that no emphasis is laid on that fact in the statement of facts, it is plain that he was dealing with the matter on that basis because he refers to *The Mac* (2)—a case of a mud hopper which was never, and could not be, propelled by oars—and says that the barges in the case he was deciding were like in construction and mode of navigation to the barge in *The Mac.* (2) The case, therefore, was decided, in my opinion, on the basis that they were not barges

(1) [1922] P. 175; 15 Asp. M. L. C. 498. (2) 7 P. D. 126.

propelled by oars in their general character or description, and not that they were, at the time, not being propelled by oars but by attachment to a steam tug.

In my view, therefore—and I am deliberately not going to examine all the cases on the subject, because, in one sense, the point is academic having regard to the question about which we are both agreed—the learned judge in the Court below was wrong in holding that this barge became a ship, or was a ship at the moment when this collision happened by reason of being in tow of a tug.

Now we come to the more difficult question whether on the assumption that this barge was not a ship, the judgment of the learned judge of the City of London Court can, nevertheless, stand. I have come to the conclusion—indeed we have both come to the conclusion—that this assumption is not decisive of the question. I will restate the position. The barge was in tow of a ship—she was run into by a ship. Let us assume that she herself was not a ship; the question is whether, nevertheless, the Court had jurisdiction to entertain her claim. Mr. Carpmael argues that that depends on whether the old Court of Admiralty would have had jurisdiction to entertain the claim. County Courts have a jurisdiction, within certain pecuniary limits, which is at least co-extensive with the jurisdiction of the old Court of Admiralty, except that in one respect it is larger. His point is that the old Court of Admiralty clearly had jurisdiction, at any rate where two vessels collided even though one of them was not a ship. I have come to the conclusion that Mr. Carpmael is right in that submission. In the main it is based upon *The Zeta* (1), and on *Reg.* v. *Judge of the City of London Court.* (2) In the earlier case Lopes L.J. says this: "In my opinion, the cases are clear to shew that the jurisdiction which has been conferred upon the county courts is the jurisdiction of the Admiralty Court, except in one particular which I will mention presently, but only a limited jurisdiction—a jurisdiction up to 300*l.* The cases are, to my mind, clear that no larger jurisdiction has been given to the county courts than that which was possessed

(1) [1893] A. C. 468. (2) [1892] 1 Q. B. 273, 300.

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by the Admiralty Court, that jurisdiction being limited to 300*l.*, and no larger jurisdiction, except with regard to charter-parties, and that is a matter with which we have nothing to do now. Now, the authorities upon which reliance was placed to establish that proposition are three: *Everard* v. *Kendall* (1), *Allen* v. *Garbutt* (2), and *The Dowse* (3); and they go strongly, and I think conclusively, to support the proposition that no larger jurisdiction with respect to collisions has been given to the Admiralty side of the county courts than was possessed by the Admiralty Court itself." There are other passages in the case to the same effect, and Mr. Carpmael at the close of his argument called our attention to another case, *Reg.* v. *The Judge of the City of London Court* (4), which certainly does not conflict with the judgment which I have just read; and I think that Mr. Carpmael is justified in his contention that the jurisdiction of the county court in Admiralty is—with an immaterial exception or addition which does not matter for the present purpose—at least co-extensive with the jurisdiction of the old Court of Admiralty.

The next question, therefore, is: would the old Court of Admiralty have had jurisdiction in this case? It is said that *Everard* v. *Kendall* (1) decides the contrary. In my opinion *Everard* v. *Kendall* (1) decides no more than this, that where one has two things, neither of which is a vessel, then the County Court has no jurisdiction because—rightly, I think—it was conceded in that case that the Court of Admiralty itself would not have had jurisdiction. Where one has two things which float but neither of which is a ship, there is no Admiralty jurisdiction. That is of no assistance in deciding whether, where one of them is admittedly a ship, though the other may be only a vessel, the Admiralty Court would have had jurisdiction. In my opinion *The Zeta* (5) makes it reasonably plain that the Admiralty Court in such a case has jurisdiction. I think the passage in Lord Macnaghten's opinion—and there is certainly nothing inconsistent with it in Lord Herschell's

(1) L. R. 5 C. P. 428.
(2) 6 Q. B. 165.
(3) L. R. 3 A. & E. 135.
(4) 8 Q. B. D. 609.
(5) [1893] A. C. 468, 480.

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opinion—makes it plain that where there are two vessels and one of them, at any rate, is a ship, the Admiralty Court has jurisdiction in respect of a contact between the two—I deliberately have not used the word " collision "—and it does not matter if either the object receiving, or the object doing the damage, was not a ship, provided that the other object was a ship. Now, Mr. Hayward, while acknowledging that that is the effect of Lord Macnaghten's opinion, and also of Lord Herschell, says that those opinions were obiter in the particular case and cannot prevail against the express words of the two County Court Admiralty Jurisdiction Acts, and he has argued that the words " damage by collision " in sub-s. 3 of s. 3 of the Act of 1868 must be read as restricted by—not as enlarged by—the words of s. 4 in the Act of 1869. Now it is quite clear that the learned Lords in *The Zeta* (1), thought that the words " damage by collision " were satisfied if either the damaging, or the damaged vessel was a ship. Mr. Hayward argued that since 1869—though *The Zeta* (1) was decided in 1893—that is not possible, because s. 3 is to be read, if not with regard to other matters, at any rate with regard to damage by collision, as if it extended and applied only to claims for damage to ships. I do not so read s. 4 of the Act of 1869. I think that the effect of that Act is this : the Legislature had realized that they had only allowed shipowners to claim for damage by collision, and in the intervening year it was realised that there were more ways of hurting a ship than by a collision between herself and another vessel ; and consequently they said that with regard to ships, s. 3 of the earlier Act would apply to all claims for damage, whether by collision or otherwise, but it did not cut down the words as they already stood. It did not say that a claim for damage by collision could only be brought in future where both the vessels were ships, regardless of the existing law that, provided one of them was a ship, such a claim could already be brought. I do not think that that was the effect of the Act at all, and, in my opinion, Mr. Carpmael has made good his point that the old Admiralty Court would have had jurisdiction

(1) [1893] A. C. 468.

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to deal with this case; that the county courts which have Admiralty jurisdiction have a jurisdiction co-extensive in this respect with that of the old Admiralty Court; and that, therefore, on that ground, the City of London Court had jurisdiction to deal with this particular collision.

In my opinion the judgment of the learned judge should be supported upon that ground.

BATESON J. I agree with my Lord on this point, and I do not want to add anything to what he has said upon it, but I will say a few words—because I am very sorry that I am not at one with him—about the other point upon which the learned judge in the Court below has decided.

I think that what one has to consider, sitting as a county court judge, is whether one has jurisdiction to try the particular case which is being presented, and the case that was being presented was that of a vessel in tow of a tug being brought into collision with another tug under way. Whether this barge which was in tow of the tug is more often in tow of a tug than not, does not seem to me to matter in the least. It is said that she is a barge that goes up canals, and may be towed by a horse or another barge, but in this particular case the question is, had the judge jurisdiction in Admiralty to try a case where a vessel in tow of a tug is brought into collision with another tug? I cannot see what is to prevent him having jurisdiction. It is said that although there had been a collision between two vessels there is no jurisdiction under s. 3, sub-s. 3, of the County Court Act of 1868, which says that there is jurisdiction as to any claim for damage by collision. It is said that those words do not cover this case because *Everard* v. *Kendall* (1), and one or two other cases, have suggested that those words "damage by collision" must be confined to collision between ships. *Everard* v. *Kendall* (1) does not say so. All that case, as I understand, decides is that the Admiralty Court never had jurisdiction to try a case of collision between two barges; it never was given jurisdiction to try a collision

(1) L. R. 5 C. P. 428.

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between two barges by the Acts of 1840 and 1861. That does not seem to me to have really any bearing on this case and but for the argument that the word "collision" in sub-s. 3 involves a collision by a ship, there would not be anything to be said. But supposing it does involve a collision by a ship, then it seems to me that this vessel, being in tow of a tug, must be regarded as a ship. She is not being propelled by oars only. The definition of a ship in all the Acts of Parliament to which we have been referred is "a vessel used in navigation not propelled by oars." This vessel was not propelled by oars. I dare say she very often was propelled by oars, but on this occasion, with reference to this action, she was being propelled by the steam of the tug, and in that sense I think that she was a steamer; she would be so regarded for the purposes of navigation and the rules of navigation. A vessel that is propelled by oars alone only goes about in narrow waters and for comparatively short distances. When she is being towed by a tug she can go into all sorts of waters, be towed into all sorts of positions, and get into all sorts of trouble which she cannot get into if she is propelled by oars only, and that may be a good reason for regarding her as a ship. Therefore, in my view, this vessel was a ship, if it be necessary that it should be so held in order to bring her within sub-s. 3 of s. 3 of the Act of 1868.

I rather agree with what my Lord has said about the cases which have been relied on by the learned judge in the Court below—that in those cases it seems clear that none of the vessels were propelled by oars at all. It certainly was so in *The Harlow* (1); it certainly was so in *The Mac* (2), *The Mudlark* (3), and *The Lighter No.* 3 (4), and I think also in *The Norfolk Coast.* (5) I think in all these cases the barges were unpropelled by oars, and therefore the definition does not apply to them. This case is not a case like those at all, except so far as there was a towage going on in all of them.

(1) [1922] P. 175; 15 Asp. M. L. C. 498.
(2) 7 P. D. 126.
(3) [1911] P. 116.
(4) 18 Times L. R. 322.
(5) 11 Ll. L. R. 228.

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Reference has been made to *Ex parte Ferguson.* (1) In that case the facts were that the vessel that came into collision was actually sailing at the time and was actually regarded as a sailing ship. That seems to me to be very much like this case except that the vessel which came into collision was being towed by steam, and I think it not improper to hold that she was a ship within the meaning of the definition to which reference has been made.

For these reasons, I think that the appeal should be dismissed on both grounds, not only on one.

Appeal dismissed. Leave to appeal.

Solicitors for the appellants: *Keene, Marsland, Brydin & Besant.*

Solicitor for the respondents: *A. Sackville Hulkes.*

(1) L. R. 6 Q. B. 280.

E. C. M. T.

IN THE MATTER OF THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925 (15 & 16 GEO. 5, c. 49), s. 188, sub-ss. 1, 2.

IN THE MATTER OF THE LEGITIMACY ACT, 1926 (16 & 17 GEO. 5, c. 60), s. 1, sub-s. 1.

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Nov. 6.
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April 6;
July 12, 13, 28.

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Status—Nationality—Legitimacy—Parentage of Petitioner seeking decree of British Nationality—Legitimacy at Birth—Legitimatio per subsequens matrimonium—British Nationality Act (1730) (4 *Geo.* 2, *c.* 21), *s.* 1—*British Nationality Act*, 1870 (33 *& 34 Vict. c.* 14), *s.* 10, *sub-s.* 3 (*since repealed*)—*British Nationality & Status of Aliens Act*, 1914 (4 *& 5 Geo.* 5, *c.* 17), *s.* 1—*British Nationality & Status of Aliens Act*, 1918 (8 *& 9 Geo.* 5, *c.* 38)—*British Nationality & Status of Aliens Act*, 1922 (12 *& 13 Geo.* 5, *c.* 44)—*Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (15 *& 16 Geo.* 5, *c.* 49), *s.* 188, *sub-ss.* 1, 2—*The Legitimacy Act*, 1926 (16 *& 17 Geo.* 5, *c.* 60), *s.* 1, *sub-s.* 2.

The meaning of the term "father" as applied in Statutes extending from 1730 to 1926 to the parentage of those who are entitled to the status of natural born subjects of the Crown and to be regarded as of British nationality is limited to a father whose children are legitimate at the date of birth. Legitimatio per subsequens matrimonium cannot be imported into these Statutes under the Legitimacy Act, 1926.

The Legitimacy Act, 1926, does not ipso facto by the mere use of the terms father and mother confer upon either parent or child a lawful or legitimate character. A petitioner seeking a declaration pursuant to that Act that he is of British nationality must shew that his father was a natural-born subject, and if in the circumstances existing at the date of his birth the petitioner according to our law has not had a lawful father, he is not entitled to the benefits of legislation providing for a declaration of his status as a natural born subject of the Crown.

PETITIONS for declaration of legitimacy and naturalization.

Bennie Abraham by his petition dated November 10, 1930, and entitled In the matters of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, and the Legitimacy Act, 1926. claimed as the natural child of Lawrence David Abraham (since deceased) and Mame Ueda, now Mame Abraham, to have it respectively declared that the said Lawrence David Abraham and Mame Ueda were lawfully married in Japan on March 29,

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1905, that the petitioner became legitimated as from January 1, 1927 (the commencement of the Legitimacy Act, 1926), and further that the Petitioner had the right to be deemed a natural subject of His Majesty pursuant to the Judicature (Consolidation) Act, 1925, s. 188.

By the petition it was alleged that at the date of his marriage Lawrence David Abraham was domiciled in England and Mame Ueda in Japan and that both were unmarried at the date of the birth of the petitioner. It was also stated that Lawrence David Abraham died in London, intestate, on June 28, 1927, possessed of an estate approximating £12,000 in value, in which the petitioner if legitimate would be entitled to share.

Joey Abraham, a brother of the first petitioner, by a petition dated December 12, 1930, and similarly entitled, and setting forth the same facts as Bennie Abraham as to parentage and property claimed to have it declared that his parents were lawfully married at the time and place already mentioned resulting in similar legitimacy of this petitioner, but this petitioner made no claim to a declaration that he was a natural born subject of His Majesty as he had been formally naturalized in 1929 as a Japanese subject. There were two sisters of the petitioners born of the same marriage. They consented to the petitions.

By an order dated April 18, 1931, the suits instituted by both petitions were consolidated for hearing.

The evidence, oral (including that of Tatsuo Sagawa, a member of the Japanese Bar) and documentary, was to the following effect. Lawrence David Abraham, the father of the petitioners was a Jew of a family long settled in London, where his parents were married in 1859. He was born in London in 1863 and that was his domicil of origin. From 1881 onwards he was engaged in business in Japan and in 1890 set up in business there on his own account. About the same time he formed a connection with a Japanese woman Mame Ueda. By 1899 four children had been born of this connection, two of them being the petitioners. The children were brought up living with their natural parents near Kobe in

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Japan, which was undoubtedly the place of residence of the parties. In 1905 a marriage was celebrated in Japan between the parents, the validity of which was not now contested. At all material times Lawrence David Abraham was a partner in a London mercantile firm, besides his business interests in Japan. On more than one occasion he revisited England and he made declarations that he was English and had an English domicil. In 1927 he died in England while on a visit to this country ; his cremated remains were by his request transmitted to Japan.

T. Bucknill (*R. H. Bayford* with him) for the petitioners. Both the petitioners are clearly within the benefit of the Legitimacy Act, 1926, and legitimate from January 1, 1927, the commencement of the Act. As to the petitioner Bennie the further questions arise whether he is a British national and whether he becomes one by birth. The latter question was discussed in *Shedden* v. *Patrick* (1). Since then the right to British Nationality has been defined by the British Nationality and Status of Aliens Act, 1914 (s. 1). The petitioner is within the definition given in s. 1, sub-s. 1 (*b*) of the Statute as a person born out of His Majesty's dominions whose father was a British subject at the time of that person's birth. In this case the previous generations of the Abrahams family were clearly all British subjects.

[THE PRESIDENT. Although the father of the petitioner may have had the status of a British subject in 1914 he could not have availed himself at that date of any system of legitimatio per subsequens matrimonium. The dissenting judgment of Lush L.J. in *In re Goodman's Trusts* (2) is material on this point.]

This question of legitimate status was a contentious subject as far back as the Statute of Merton, which is exhaustively dealt with in that dissenting judgment. Before the date of the decision in *In re Goodman's Trusts* (2) the difference between our law and that of other countries as regards status of legitimacy had become a familiar topic. With the decision of *In re Goodman's Trusts* (2) there began the recognition as a matter

(1) (1854) 1 Macq. H. L. 535. (2) (1881) 17 Ch. D. 266, 269.

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of the comity of nations of the father of a child born before wedlock and of the right of that child born before wedlock to become entitled to personal estate by reason of the subsequent marriage of its parents.

[THE PRESIDENT. No change of our law was effected by the decision of *In re Goodman's Trusts* (1) in 1881. There was then merely recognition of international law and usage on this question.]

The then existing state of things resulted in the passing of the British Nationality and Status of Aliens Acts, 1914 to 1922. The Judicature (Consolidation) Act, 1925, s. 188 (2), merely effected a consolidation not an alteration of the law. Sub-s. 2 of the section limits the qualifications of a natural born subject of the Crown to those expressed by sub-s. 1, and the petitioner coming to the Court for a declaration of legitimacy under the Legitimacy Act, 1926, relies on those qualifications as he might if born legitimate. If the petitioner is entitled to the declaration of legitimacy which he seeks under the Legitimacy Act of 1926 he is also entitled under the Act of 1925 to a declaration that he is a natural born subject of the Crown.

The father of the petitioner had an English domicil, the conditional status for the petitioner required by the Legitimacy Act.

[THE PRESIDENT. What is actually effected by the legislation is the relation of parent and child.]

By the British Nationality and Status of Aliens Act of 1922 the definition of a natural born British subject in the Act of 1914 is amended to read "any person whose father was at the time of that person's birth a British subject." The petitioner was born in 1893 and the submission is that his

(1) (1881) 17 Ch. D. 266, 269.

(2) The Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49, s. 188, sub-s. 1. Any person who is a natural born subject of His Majesty, or whose right to be deemed a natural born subject of His Majesty depends wholly or in part on his legitimacy . . . . may, if he is domiciled in England . . . . or claims any real or personal estate situate in England apply by petition to the court for a decree declaring that the petitioner is the legitimate child of his parents . . . . (2) Any person who is so domiciled or claims as aforesaid, may apply to the court for a decree declaring his right to be deemed a natural born subject of His Majesty.

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status was fixed by the Act of 1914. If so, he is entitled, if held legitimate under the Act of 1926, to a declaration of nationality under the Act of 1925, s. 188. Unless he is within the Act of 1914, he was born out of allegiance to the Crown, as, in that event, he is, prima facie, Japanese, having a Japanese mother and, in law, no father. The general principle is that a child follows the nationality of its lawful parent. (See the repealed British Nationality Act, 1870 (33 Vict. c. 14), s. 10, sub-s. 3, and the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 5.

Wilfrid Lewis (*G. K. Rose* with him) for the Attorney-General. The validity of the marriage of the parents of the petitioner is not now challenged.

As to British nationality, the petitioner Bennie could not have claimed it at all before the Legitimacy Act, 1926. He now also relies on the Act of 1914, but he was born before the commencement of the latter Act of which s. 1, sub-s. 3, expressly excludes from its operation persons born before its commencement. Further the House of Lords in *Shedden* v. *Patrick* (1) construing the Act 4 Geo. 2, c. 21, s. 1, decided that "father" means legal father at the date of the birth of an individual who claims to be regarded as a British subject and that legitimacy cannot be effected through the subsequent marriage of the parents. In *Shedden* v. *Patrick* (2) Lord Cranworth L.C. clearly lays down that the preliminary condition of allegiance to the Crown under the Statute of Geo. 2 is that the party claiming to be a natural born subject should have a father who was also a natural born subject and that a bastard being filius nullius could not comply with the condition; and Lord Brougham (2) points out in dealing with legitimatio per subsequens matrimonium that it would be "a most violent presumption" to hold that a subsequent marriage of parents effecting legitimacy relates back to the birth of the legitimated child. These passages as well as others in the judgments of the learned Lords show that "father at birth" was intended by the expression "father" in the Act of 1730 and that bastards

(1) 1 Macq. H. L. 535, 612. (2) 1 Macq. H. L. 623.

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could not be within the scope of the Act as they had no father at birth. The sequel is found in the Act of 1926, under which the party claiming legitimation is legitimated from a fixed date only and not as from birth. The fatherhood is, so to speak, limited. That Act was never intended to refer to aliens, nor does it confer the status of a British subject on a legitimated child.

In the construction of the Act of 1914 " father " must have the same meaning as was given it in *Shedden* v. *Patrick*. (1) Any construction of the Acts different from that which the Attorney-General contends for would achieve a result differing from the law of Scotland on this topic which was not the intention of Parliament in passing the Legitimacy Act.

The Act of 1926 does not deal with nationality further than this, i.e., that s. 8 confers a father upon an illegitimate child if the father of the child was at the time when he married its mother domiciled in a country where the rule of legitimatio per subsequens matrimonium was in force. Under s. 1, sub-s. 1, of the Legitimacy Act the question turns initially upon the English domicil of the father of the petitioner at the date of his marriage. The permanent place of residence of the wife and children is material and in this case conflicts with the suggestion of an English domicil of the father. *Platt* v. *Attorney-General of New South Wales* (2), *Attorney-General* v. *Yule*. (3)

Bucknill in reply. The Act of 1926 alters the relation of the natural son and his father. From its date the natural son is for the first time recognised as having a father.

Cur. adv. vult.

July 28. THE PRESIDENT [having dealt with the facts, continued :] Questions arise in this case as to the effect of the Legitimacy Act of 1926. Lawrence David Abraham and Mame Ueda were married in 1905. In 1930, the son Bennie filed a petition under the Legitimacy Act seeking, as he might under that Act, a declaration of his legitimacy, seeking to become a legitimated person by reason of the marriage of his

(1) 1 Macq. H. L. 535.
(2) (1878) 3 App. Cas. 336. (3) (1931) 145 L. T. 9.

father and mother subsequently to his birth, and he not only claimed a decree of legitimacy, but claimed also to be deemed a natural born subject of His Majesty the King ; that is to say, he claims a decree of naturalization as well as of legitimacy. That is the petition of Bennie. The petition of Joey, which was filed about a month later than that of Bennie, simply claims a declaration of the validity of the marriage of his natural parents and of his subsequent legitimacy as from the 1st day of January, 1927, the commencement of the Statute, the earliest date to which a decree or declaration of legitimacy could apply.

Now the proceedings in this case are taken under the Judicature (Consolidation) Act of 1925 as well as the Legitimacy Act. One of the provisions of the Judicature (Consolidation) Act, s. 188, sub-s. 1, is a provision whereby a natural born subject or person whose right to be deemed a natural born subject depends wholly or in part on his legitimacy may, if he is domiciled in England or Northern Ireland—and so on—apply by petition for a declaration that he is the legitimate child of his parents. That, of course, was antecedent to the Legitimacy Act, 1926 which dealt with the mere declaration of actual legitimacy under circumstances described there. Then s. 188, sub-s. 2, says that a person who is domiciled here or claims under sub-s. 1 may apply to the Court for a decree declaring his right to be a natural born subject of the Crown.

The claim for a declaration of legitimacy depends partly upon domicil and partly upon s. 1, sub-s. 1, of the Legitimacy Act of 1926. That statute says that " where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of the Act the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of the Act, or from the date of the marriage, whichever last happens." There are various limitations in the Act and various provisions in the Act which tend to demonstrate its intentionally limited character—one might also say its carefully limited character.

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Now it will be seen with regard to the question of legitimacy here that what has to be ascertained first is whether Lawrence David Abraham, who on both sides is agreed to be the person described as the father of these two applicants, was at the date of the marriage domiciled in England or Wales. That was the first question to be decided. The Attorney-General was made a party to these petitions and he was represented here by Counsel and the matter was discussed fully and seriously as the nature of the case required and as the various Statutes governing the jurisdiction demand. The Legislature for many generations—probably two centuries and half—has carefully controlled the matter of naturalisation, and as to legitimacy down to 1926 there was an iron-clad refusal to introduce into this country the provision by which the children of natural parents—that is illegitimate children of parents married after the birth of those children—should be legitimised. In this country for the first time in 1926 was any action in that direction taken.

With regard to the question of domicil there was very great conflict here. At one time there was a question whether the marriage at Kobe was a marriage of which this Court can take cognisance. No dispute now exists on that subject ; it is agreed to be an effective marriage. I have then to determine whether Lawrence David Abraham was domiciled in England at the time of the marriage. There are very many authorities which determine the law of domicil and illustrate it, and my attention was particularly called to a case—two cases, in fact, *Platt* v. *Attorney-General of New South Wales* (1) and the *Attorney-General* v. *Yule* (2), where it was laid down that it was always material in determining what is a man's domicil to consider where his wife and children live and have their permanent place of residence.

Counsel for the Attorney-General naturally called attention to that matter. The country of Lawrence David Abraham and Mame Ueda, who became his wife in 1905 (and the children while there was a household comprising them all)—the country in which they had their place of residence—was undoubtedly Japan, but that is not a decisive matter. Lawrence

(1) 3 App. Cas. 336. (2) 145 L. T. 9.

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David Abraham's country of origin was England. He had never given up his business association with England, never completely separated from it. His widow Mame Ueda said that he had always declared to her that he was English and that his domicil was English, and it is a very material fact that in the certificates relating to the marriage of 1905, in which the children who had been born previously—four children—were identified, Lawrence David Abraham does definitely declare himself to be an Englishman having his primary home here in London. I have considered the matter. There is evidence on both sides, but I have considered the matter and I have come to the conclusion that the domicil of origin had not been abandoned. Of course there are the familiar cases of *Udny* v. *Udny* (1) and *Bell* v. *Kennedy*. (2) Nevertheless, I have come to the conclusion on the facts of this case that the domicil of origin had not been abandoned and that at the time of the marriage to Mame Ueda Lawrence David Abraham was domiciled in England.

That is the first finding of fact with regard to the application here. The father of the two petitioners was at the date of the marriage domiciled in England. Then that being so the relevant provisions of the Legitimacy Act of 1926 apply to the case and each of them is entitled to a declaration of legitimacy as from the 1st January, 1927. That is the date provided by the Statute : The commencement of the Act or the date of the marriage, whichever last happens. That is one of the gravely limited provisions of the statute.

Next comes the question of the effect of the Naturalization Acts. There is a great series of Statutes governing the conditions under which persons born in wedlock within the allegiance of the Crown may be declared or become subjects of the King—English nationals. There are Statutes which extend back to the beginning of the 18th century ; there is a very important Act, the British Nationality Act, 4 Geo. 2, c. 21, and there is a succession of Acts extending down to the year 1922, Acts of 1870, 1914, 1918 and 1922. The material provision of the Act of George the Second contains these words :

(1) (1869) L. R. 1 H.L. Sc. 44. (2) (1868) L. R. 1 H.L. Sc. 307.

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"All children born out of the ligeance of the Crown . . . . whose fathers were or shall be natural born subjects of the Crown . . . . at the time of the birth of such children respectively, shall . . . . be adjudged and taken to be, and all such children are hereby declared to be natural born subjects of the crown." It is with regard to that provision and the like provisions in the later Statutes that the contest was waged here upon the very resolute demand of counsel on behalf of the first petitioner Bennie that he should be declared a British national. What was said with regard to that was that the Legitimacy Act recognises three people: The child, that is the natural born child (or bastard as expressed in the Common Law); its father; and its mother. Counsel said that they are all given legal status by the Act. He referred to s. 1 of the Legitimacy Act in which the first sub-section describes the parents of an illegitimate person, the second sub-section where the father or mother of an illegitimate person are referred to, and the description in s. 2 of the person claiming that he or his parent became or has become a legitimated person. He said that the Statute treats the natural parent of the child entitled to be legitimated as its father, and argued that the child becomes thereby upon legitimation a child born of the father and so no longer a child without a father. Counsel for the Attorney-General on the other side argued that in point of fact looking at the whole tenour of the Legitimacy Act it could not be said, as a matter of reason, that the applicant Bennie had a father in the legal sense at the time of his birth—that is a lawful father, and insisted very strongly upon the limitations which mark the provisions of the Legitimacy Act. Both counsel discussed the very familiar case of *Shedden* v. *Patrick* (1) which arose under the British Nationality Act of 1730. It is sufficient, in order to see the relevancy of that case (if it applies here, and is not excluded by the Legitimacy Act) to refer to the headnote: "A child born a bastard in a foreign country not recognising the doctrine of legitimation per subsequens matrimonium is an alien, although his putative father was a Scotchman domiciled all his life in

(1) 1 Macq. H. L. 535.

Scotland, and although such putative father afterwards married the mother of the bastard for the express purpose of rendering the bastard legitimate." The question there, apart from the Legitimacy Act and its express terms upon which counsel so strongly relied, is substantially the question in this case. It was gravely discussed by very eminent lawyers in the House of Lords, Lord Cranworth L.C., Lord Brougham and Lord St. Leonards. It will be sufficient perhaps to read a passage from the opinion which Lord St. Leonards delivered. He says this (1): "Nobody will dispute that under that Act (4 Geo. 2, c. 21) a legitimate child, the child of a natural born subject, becomes a natural born subject from the moment of his birth; that is beyond all doubt." Then later the noble and learned Lord went on to say (1): "Before he can take the benefit of that Act, you must shew that his father was a natural born subject. And if he have no father, then of course he is not entitled to the benefit of the statute." That means no lawful father at the time of his birth, and although there had been the subsequent marriage which legitimated the issue of that Scottish marriage it was declared that they had not become natural born subjects because at the time of the birth they had no father.

I have to consider whether the principles enunciated in *Shedden* v. *Patrick* (2) govern this case, although the status of legitimacy has been acquired by the applicant here under the English Statute of 1926, and as I said, that depends upon whether the intent of that Statute is to be gathered from the language of it in which the putative father and the natural mother of an illegitimate child are referred to as its father and mother. Counsel as I have said, insisted upon that description, and claimed that a generous construction should be put upon the Act. He said they are described as father, mother and child, and that must mean lawful father, lawful mother, and child lawfully born. To my mind that submission, although a very courageous demand under the Act, is entirely contrary to the whole tenour of the Act. Dealing with what is declared to be done as to legitimate children who before legitimation

(1) 1 Macq. H. L. 639, 640. (2) 1 Macq. H.L. 535.

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are bastards, and dealing with the circumstances under which those children have been born, counsel says that the Naturalisation Acts must be construed by reading the word "father" in those Acts as having the same construction as the word "father" in the Legitimacy Act. To my mind that is an impossible proposition; I will not say it is a fantastic proposition. It is courageous to an extreme degree, and, I think, totally inconsistent with the whole tenour, both of the Naturalisation Acts, which so jealously guard the right of British nationals, and with the simple intent of the Legitimacy Act, 1926. I ought to say that as an instance of how restricted the intention of the Act of 1926 is, a section was inserted (s. 6) which demonstrates with what care the operative provisions are to be applied. It provides this: "A legitimated person shall have the same rights and be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate." Notice what care is used there to see that the putative parents, in respect of whom rights of maintenance and support are enacted, are described for the purpose of that operative section. To my mind the whole tenour and intent of the Naturalisation Acts, when well understood, tend to repel the demand put forward in this case. The claim for naturalisation in the case of Bennie Abraham therefore fails.

There will be declarations of legitimacy under both petitions.

Solicitors for the Petitioners: *Solomon, Staddon & Barnes.*
Solicitor for the Attorney-General: *The Treasury Solicitor.*

R. M. M.

E. M. ROSSE, *In the Goods of.*

1933
Nov. 6.

Probate—Personal Representative who has taken grant as universal legatee residing out of Jurisdiction—Special Administration granted to Trustee in Bankruptcy of Personal Representative as a person interested in the estate of the deceased—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 164. (1)

An administrator with a will annexed being also universal legatee and devisee under the will was declared bankrupt and a trustee of his estate was appointed. At the expiration of twelve months from the death of the testator the administrator had absconded from the country and had not since been heard of. A grant of special administration was made to the trustee in bankruptcy as a person interested in the estate within the meaning of the Judicature (Consolidation) Act, 1925, s. 164. (1)

APPLICATION for a grant of letters of administration with a will annexed pursuant to the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 164. (1)

The deceased Edith Marion Rosse, married woman, died on September 14, 1932, leaving a will dated August 19, 1932, of which she appointed John Maundy Gregory universal legatee and devisee but without naming any executor. In due course letters of administration with the will annexed were granted to John Maundy Gregory. The gross value of the estate was 18,865*l.* 18*s.* 11*d.* John Maundy Gregory was declared a bankrupt on May 23, 1933, and the applicant Frederick Seymour Salaman was the trustee of his estate. On April 12, 1933, John Maundy Gregory absconded from this country and had not since been heard of. Certain assets of the estate of the deceased remained unadministered. F. S. Salaman moved for special administration to the estate of the deceased.

(1) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 164 (1): "If at the expiration of twelve months from the death of a person any personal representative of the deceased to whom a grant has been made is residing out of the jurisdiction of (sic) High Court, the Court may, on the application of any creditor or person interested in the estate of the deceased, grant to him in the prescribed form special administration of the estate of the deceased."

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Hon. Victor Russell in support of the motion. The facts are within the class contemplated by the section. The applicant as trustee in bankruptcy of the universal legatee and devisee of the estate of the deceased is interested in the estate within the meaning of the section and entitled to a grant of special administration to the estate. The statute itself prescribes the interval to elapse before application can be made.

Bateson J. said that the applicant appeared to be entitled as a "person interested in the estate" within the section and made an order in the terms of the motion.

Solicitors: *Isadore Goldman & Son.*

R. M. M.

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C. A.
1933
Dec. 7, 8, 11, 12.

Shipping—Collision—Thames Estuary—Navigation round N.E. Spit Buoy—Crossing Rules—Narrow Channel Rule—Practice of Pilots—Regulations for Preventing Collisions at Sea, 1910, *arts.* 19, 21 *and Note,* 22 *and* 25,

By the practice of pilots navigating in and out of the Thames estuary, steam vessels rounding the N.E. Spit buoy from the southward to proceed up river pass outside the buoy at a sufficient distance to the northward to enable an outward bound vessel to pass between them and the buoy port to port.

Two steam vessels, the *A.*, inward bound, and the *T.*, outward bound, got into collision about 400 yards to the northward of the buoy. The *T.*, which had the *A.* on her own starboard side, and, therefore, under the crossing rule (art. 19) had the duty to keep out of the way, alleged that the narrow channel rule (art. 25) and not art. 19 applied, and that the *A.* was to blame for being too close to the buoy and for not keeping to her own starboard side of the channel, the southern limit of which was the buoy.

Langton J. held that it was impossible to apply art. 25 to waters which were defined only by one or more buoys and which had on the other side the whole of the North Sea; that art. 19 applied, and that the *T.* was to blame for not keeping out of the way. He found, however, the *A.* also to blame, not for having been set down by wind and tide closer to the buoy than she had intended, but under the Note to art. 21, which provides that when the vessel which has the duty of keeping course and speed under the crossing rules "finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision"; and in the result the *T.* was held three-fourths to blame and the *A.* one-fourth. On appeal:—

Held, (i.) that the crossing rule and not the narrow channel rule applied; (ii.) that the practice did not exclude the crossing rule, but was in fact the direct consequence of the group of rules of which art. 19 was one; for, by art. 22 the vessel which is to keep out of the way "shall . . . . avoid crossing ahead of the other," and, if she does not cross ahead, she will ultimately pass port to port; (iii.) that on the facts it appeared that with close navigation there was room for the *T.* to pass between the *A.* and the buoy, but (iv.) that, if there was not room, although a vessel ought not as a general rule to pass inside a channel buoy, the *T.*, whose draught enabled her to do so, should, to avoid immediate danger, have gone inside the buoy; (v.) that up to the time the *A.* acted the *T.* could easily have avoided the collision by her own unaided action, and that the *T.* was alone to blame.

Judgment of Langton J. [1933] W. N. 244; 50 Times L. R. 66, varied.

APPEAL and CROSS-APPEAL from a judgment of Langton J. in an action of damage by collision.

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The plaintiffs were the owners of the Greek steamship *Archon* and her master and crew; the defendants were the owners of the British steamship *Treherbert*. The collision took place, according to the finding of the Court, in the Thames estuary about two cables to the northward of the N.E. Spit buoy, on the night of September 6, 1933. The wind was fresh from the N.E. and the flood tide was setting strongly in the same direction as the wind was blowing.

The *Archon*, a vessel of 3511 tons gross, was inward bound from the River Plate to London in charge of a Cinque Ports pilot, and at the material time was making about nine knots on a course of N. by W. ½ W. magnetic, intending to pass the N.E. Spit buoy on her port side. The *Treherbert*, a vessel of 4517 tons gross, was outward bound in charge of a Trinity House pilot. She was on a course of S.E. ½ E. magnetic, making about ten knots, and, having come down the Edinburgh Channel, was intending to pass the N.E. Spit buoy on her starboard hand and then shape her course to round the Downs and proceed down Channel to Cardiff. When the vessels sighted each other's lights, the *Treherbert* had the masthead and red lights of the *Archon* open on her starboard bow, while the *Archon* had the *Treherbert's* masthead and green lights open on her port bow.

The *Archon's* case was that she kept her course and speed, but that the *Treherbert*, continuing on and slightly narrowing her bearing, when distant about a quarter of a mile sounded one short blast. The *Archon* replied with a short blast and her helm was ordered hard-a-starboard (direct command), as it was judged that the *Treherbert* could not then avoid collision by her action alone. The *Treherbert* then sounded three short blasts, but although the *Archon* also ordered her engines full speed astern and sounded three short blasts the *Treherbert* came on and with her stem and port bow struck the port side of the *Archon*, doing so much damage that the *Archon* shortly afterwards sank.

The *Treherbert's* case was that she maintained her course, shaping to pass the N.E. Spit buoy close to on her starboard side, in the expectation that the *Archon* would pass her

safely port to port, but that the *Archon* swung to port towards her; that the *Treherbert's* wheel was starboarded, her engines stopped and then put full speed astern and the wheel hard-a-starboarded, but that the *Archon* still came on at high speed, beginning to swing rapidly to starboard, and that the collision then happened.

The case for the *Archon* accordingly was that she was the stand-on ship and that the *Treherbert*, in breach of art. 19 of the Regulations for Preventing Collisions at Sea, failed to keep clear of her; the case for the *Treherbert*, on the other hand, was that the *Archon* failed to keep to her own starboard side of the channel and/or to enter the Queen's Channel on her starboard side and to pass the *Treherbert* port to port. In the alternative the *Treherbert* alleged that the *Archon* failed to keep her course and speed.

The material articles of the Collision Regulations were the following:—

Art. 19.—When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 21.—Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

NOTE.—When in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Art. 22.—Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 25.—In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Langton J. found both vessels to blame. In the course of his judgment he said that it was a matter of great

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importance to the nautical world that there should be no kind of ambiguity as to what Rule of the Road at sea applied in this locality. The pilot of the *Archon* said that he was acting under the crossing rules under which she was the stand-on vessel. On behalf of the *Treherbert* it was contended that the narrow channel rule was applicable; that the place was in the way of a well known track of steamships bounded by buoys on the western side, the East Margate and N.E. Spit buoys; that by the practice and by good seamanship vessels bound either up or down left those buoys to the westward; that the *Archon* did not keep sufficiently to her starboard side of the N.E. Spit buoy; and that accordingly the crossing rule, at any rate in the earlier stages, did not apply.

In his Lordship's opinion it was impossible to apply art. 25 to waters which were defined only by one line of buoys, and which had on the other side the whole of the North Sea, and he held that the crossing rules, and no other rule, applied. There was a practice, however, and the Elder Brethren advised him that it was a wise practice, for the incoming vessel to leave the N.E. Spit buoy well clear on her port side in order to leave room for any outgoing ship to make her turn under starboard wheel and pass the incoming ship port to port. It so happened that owing to the force of the wind and tide the *Archon* was set down towards the buoy more than she had intended. That was a miscalculation, but not, in the circumstances, negligence. He rejected entirely the allegation that the helm of the *Archon* was ported, as described by the witnesses from the *Treherbert*. But the *Treherbert*, which had the *Archon's* lights in view, was perfectly able to see what was happening, and she, the give-way ship, stood on without taking any steps to get out of the *Archon's* way until a very late period.

As regards the *Archon*, she had to keep her course and speed, but although she knew she was being set down too close to the buoy and was making it difficult for the other vessel, she took action so late that she merely altered her heading a point or two and never succeeded in getting her

engines astern at all. She was much less blameworthy than the *Treherbert*, but she was to blame for not acting soon enough under the Note to art. 21. The proportions which he adjudged were: three-fourths to the *Treherbert* and one-fourth to the *Archon*.

The defendants appealed and the plaintiffs cross-appealed.

E. A. Digby K.C. and *Willmer* for the appellants. By the well-established practice of pilots an incoming vessel rounding the N.E. Spit buoy gives an outgoing vessel room to pass between the incoming vessel and the buoy, and the pilot of the *Treherbert* was entitled to think that he would be left room to pass port to port with the *Archon* outside the buoy. A duty is cast on all vessels by the practice, and the crossing rules never came into operation at all, because, if the *Archon* had acted normally, the vessels would have passed port to port, and the *Treherbert* had the right to rely until a very late period on the practice being followed.

[SCRUTTON L.J. There were three or four hundred yards of water between the *Archon* and the buoy: was not that sufficient room for the *Treherbert*?]

Not in the circumstances of wind and tide, and it is very difficult at night to appreciate exactly how far off an approaching vessel will pass a buoy.

If the Sea Rules are to be applied at all the narrow channel rule applies. The locality in question can properly be described as a narrow channel, which does not necessarily imply waters between banks or buoys, but depends on the course of navigation to be followed at that place; vessels treat the locality as a narrow channel, and, even if not actually in a narrow channel, the N.E. Spit buoy is in the approach to a narrow channel—namely, the Queen's Channel, which must be entered on the proper, i.e. the starboard side: *The Harvest.* (1) See also *The Kaiser Wilhelm der Grosse* (2) and *The Knaresbro'*. (3)

[LAWRENCE L.J. Rather than have a collision the *Treherbert* could have gone the other side of the buoy.]

(1) (1886) 11 P. D. 14. (2) [1907] P. 36 and 259.
(3) [1907] P. 38*n*.

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Vessels are warned in the "North Sea Pilot," Notices to Mariners, etc., not to go inside buoys marking sandbanks or shoals. If the narrow channel rule applies there was an obligation on both vessels to act, and both ought to have appreciated the position earlier than they did. Certainly the pilot of the *Archon* had ample evidence that she was making leeway, and she ought not to have been excused for disregarding the practice and being too close to the buoy; she ought to have been held to blame to a much greater degree than the one-fourth found by the learned judge.

The Karamea (1), where the crossing rules were held to apply, is distinguishable, for there was no definitely fixed rule of practice as to the navigation as there is in the present case, which in some aspects resembles *The Gustafsberg* (2), where Barnes J. said that the merits of the case did not depend on the application of the Sea Rules at all: see also *The Ashton* (3), where he said that traffic treated the channel in the part of the Humber in question as a narrow channel.

[SCRUTTON L.J. But the learned judge nevertheless applied the crossing rules.]

Assuming that the crossing rules apply, the *Archon* was not keeping her course; she was making so much leeway that instead of passing the buoy at a distance of nearly half a mile she was set down close to it. "Keeping course" means continuing to do what the vessel is in the process of doing: i.e., rounding the buoy; it does not mean maintaining the same compass heading, which, in a winding river, for example, would put the vessel ashore: see *The Roanoke*. (4) The *Archon* ought to have starboarded her wheel to correct the course she was actually making good, just as a sailing vessel crossing a tide-way has to use helm action; such action is a compliance with, and not a breach of, the stand-on rule (*The Taunton* (5)), and the *Archon* would not even have been justified in sounding her whistle to indicate such helm

(1) [1921] P. 76; [1922] 1 A. C. 68.
(2) [1905] P. 10, 16.
(3) [1905] P. 21.
(4) [1908] P. 231, 239, 246.
(5) (1928) 31 Ll. L. R. 119.

action, for she would not have been "altering her course": see also *The Echo* (1); *The Gulf of Suez.* (2)

W. Norman Raeburn K.C. and *R. F. Hayward* for the respondents and cross-appellants. The *Archon* was shaping to pass the N.E. Spit buoy at a distance of about two cables, which allowed ample space for the *Treherbert* to pass her outside the buoy port to port. It is obvious, however, that the crossing rules apply in this locality and not the narrow channel rule. The *Archon* was making some leeway, but she was maintaining her course and was not entitled to correct the leeway by deliberate helm action involving a change of heading, and, according to the appellants, without even notifying the approaching *Treherbert* by whistle signals. The *Archon* had to keep her course, and under the crossing rules, the *Treherbert* had not only to keep out of the way, but (art. 22), to avoid crossing ahead of the *Archon*. It follows, therefore, that the vessels would ultimately pass port to port without any question of "practice" being introduced into the case; indeed the so-called "practice" is not applicable to all vessels, for those bound, for example, to Flushing and Antwerp continue on and do not round the N.E. Spit buoy on to a southerly course. This case is indistinguishable from *The Karamea* (3), indeed it is a stronger case, and *The Ashton* (4) also is conclusive against the appellants' contention, for, although the waters in that case appeared to be treated as a narrow channel, the crossing rules were held to apply.

On the cross-appeal the plaintiffs should succeed, for the *Archon* was not to blame for not acting sooner than she did. It is always a matter of great difficulty for the stand-on vessel to know the precise moment when she must act, and the rule was designed to secure that she shall keep her course and speed until the last safe moment: see *The Albano* (5), *The Orduna* (6), and the observations of Lord Buckmaster in *The Otranto* (7); up to a very late moment indeed the

(1) [1917] P. 132.
(2) [1921] P. 318, 326.
(3) [1921] P. 76; [1922] 1 A. C. 68.
(4) [1905] P. 21.
(5) [1907] A. C. 193, 207.
(6) [1919] P. 381, 392.
(7) [1931] A. C. 194, 201.

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Treherbert could have avoided the collision by her own unaided action, and the vessels were about a quarter of a mile apart when the *Archon* took action. There are many reported cases in which the stand-on vessel has been condemned for acting too soon (see, for example, *The Ulrikka* (1), where the vessels were only three cables apart), but none in which the vessel has acted too late, and the pilot of the *Archon* was not even asked in the Court below why he did not take action sooner.

[Reference was also made to *The Tempus*. (2)]

Digby K.C. replied.

SCRUTTON L.J. This is a troublesome case; there is considerable difficulty as to the facts, and it is not made easier by the suggestion that it really is an international controversy between the Channel pilots and the Cinque Ports pilots. I think that the extent of that controversy has been considerably over-estimated when one hears that as far as the knowledge of experienced counsel goes there has never been a collision at this Spit buoy before the present one, so that there does not seem to have been any great practical difficulty in the past between the two schools of pilots.

The collision took place on a very clear night. The *Treherbert* was outward bound from London by the South Edinburgh Channel and proposed to turn round the North Foreland when she got to the N.E. Spit buoy. The *Archon* was inward bound and proposed, when she got to the Spit buoy, to turn up the Thames. The *Archon* had the green light of the *Treherbert* on her port bow; the *Treherbert* had the *Archon* on her starboard bow. They contrived to run into each other somewhere to the north—I am intentionally using the vaguest phrase—somewhere to the north of the N.E. Spit buoy. They completely contradict each other as to the distance, and the learned judge has taken, not a fixed distance, but a distance "at least two cables from the N.E. Spit buoy."

Now the first question is, what rules apply? The *Archon's*

(1) (1922) 13 Ll. L. R. 367. (2) [1913] P. 166; 12 Asp. M. L. C. 396.

case is that the *Treherbert*, whose green light was seen on the port bow, was a crossing ship and the give-way ship within art. 19, and that she, the *Archon*, was a stand-on ship which had to keep her course and speed. The *Treherbert's* case is that the crossing rule does not apply. When asked why it does not apply, it is said, in the first place, that the water in question is a narrow channel. The *Archon* was coming past the N.E. Spit buoy, and the plaintiffs naturally ask: "What is the other side of the narrow channel: is it the West Hinder Lightship or the coast of Belgium, or what sort of narrow channel is this about which you, the defendants, are talking?"

I think it is quite clear that the *Archon*, coming up and rounding from the southward and eastward of the N.E. Spit buoy, is not in a narrow channel. If then the narrow channel rule (art. 25) is barred by that, on what else can the *Treherbert* rely? She says that there is a practice of pilots who are on the one hand going to round the buoy and go south, or, on the other hand, going to round the buoy and go west, to pass port to port. I am quite unable to see how that excludes the crossing rule; in fact it is the direct consequence of the group of rules of which the crossing rule is one. It begins with art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side"—i.e., the *Treherbert*—"shall keep out of the way of the other." As to that, it might have been said that they were not crossing, because passing port to port they would not cross each other. In my view, that construction of the article has been ruled out by the decision in *The Karamea* (1) as well as by at least two other decisions. In *The Karamea* (1) there were two vessels which were proceeding at right-angles to each other, and it was known that somewhere near a particular buoy each of them would make a right-angled turn. The *Karamea's* case was that she was not crossing, because she was going to turn and would not cross. This Court and the House of Lords rejected that view, and, as I understand the authorities, while there may be cases in narrow channels where one does not prolong the course because

(1) [1921] P. 76; [1922] 1 A. C. 68.

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one knows that the configuration of the land requires a change of course which will involve that the ships are not crossing, when vessels are not in a narrow channel they must take their courses as prolonged, and if those two courses, so prolonged, cross each other, art. 19 applies. That was decided by every judge in the House of Lords who heard *The Karamea* and by the Court of Appeal. I will not repeat the passages in *The Karamea* (1); I remain of the opinion that what I said then, which I understand the House of Lords to have adopted, was correct. Accordingly the *Treherbert* was a crossing ship under art. 19.

Art. 22 (one of the group of four) is: "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." The *Treherbert*, therefore, which is to keep out of the way of the *Archon*, is not to cross ahead of her. It follows that if she does not cross ahead of her, she will ultimately pass port to port, which in practice is what she does. But she need not necessarily go straight on to pass port to port, because, if there is any difficulty about it, art. 23 comes in: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse"; so that the give-way vessel is not obliged to go on and try to pass port to port by the buoy; if there is any difficulty about it, she has to slacken her speed or stop or reverse. The *Treherbert* was the vessel which had to act, and it appears to me that the so-called practice is merely what must happen under the rule. It does not in any way alter the application of art. 19; it is what must follow under art. 19 if arts. 22 and 23 are observed; the practice merely represents what is desirable. Obviously, in a case like this, it is desirable that the up-coming ship should lay a course well clear of the buoy so as to avoid the necessity of the give-way ship having to stop to enable her to pass port to port, as she must if she is not to break art. 22. It appears to me to follow also that if, owing to the set of the tide,

(1) [1921] P. 76; [1922] 1 A.C. 68.

the up-coming ship has drifted nearer the buoy than was anticipated, the down-coming ship must still keep out of the way. She is not entitled to say that the up-coming ship is not giving her a clear berth, and that she (the give-way ship) will go on and run into her ; she must, as the give-way ship, either stop her engines or reverse in order that the two vessels may not pass the buoy at the same time ; or, if the circumstances are such that she cannot even by stopping her engines avoid running into the up-coming ship, she must consider whether she should not proceed inside the buoy. There is 40 ft. of water at low water (spring tides) inside that buoy. A vessel coming down drawing 12 ft. finds herself in difficulty by reason of the up-coming ship being near the buoy : if she does not think it right to stop her engines and wait till the up-coming ship is clear of the buoy, she can avoid the collision by going with her 12 ft. draught into 40 ft. of water to the west of the buoy ; and that is what the *Batavier* did. The *Batavier* had a channel pilot on board and a very experienced master, who had a pilot's licence ; and those two experienced men did go inside the buoy some 50 ft., with a ship drawing 12 ft. into 40 ft. of water. The *Treherbert* drew 18 ft., and if it was really impossible for her in her judgment to go outside the buoy, to the north and east of it, and she insisted on going on, she could have gone inside the buoy with her 18 ft. draught and nothing whatever would have happened.

All the members of the Court, however, being landsmen, have been quite unable to understand why, if there were 300 yards to the east of the buoy, a vessel with a beam of 50 ft. should not have been able to go through that 300 yards in safety. We have had the same difficulty, if the place of collision is two cables at least north of the buoy—1200 ft.—why the vessel should not have been able to go through that space in safety. We have, of course, felt that we are not navigators, and we also appreciate that the fixing of the place by the learned judge is very vague ; but we have asked the assessors this question, and they have given a very intelligent answer.

(Q.) "Assuming the judge's finding of the place of collision

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at least two cables to the north of the buoy, and that the *Archon* passed, say, one and a half cables off the buoy" (we put one and a half cables because the judge had found "not more than two cables," or something between a cable and two cables), "as a matter of good seamanship, could the *Treherbert* either (1.) have passed safely between the *Archon* and the buoy, or (2.) drawing 18 ft. 3 ins., have passed safely to the west of the buoy where the soundings show 42 feet of water at low water (spring tides)?"

(A.) "Assuming the judge's finding of the place of collision at two cables to the north of the buoy, the *Archon*, on a course N.N.W. mag. (estimated made good steering N. by W. $\frac{1}{2}$ W.) would have passed the N.E. Spit buoy five-sixths of a cable or 500 feet off, when abeam. In our opinion, as a matter of good seamanship, with a distance of one and a half cables between the *Archon* and the buoy, the *Treherbert* could have passed between, though it would have been close navigation with the prevailing conditions of fresh wind and tide setting down on the buoy. Or the *Treherbert* could have passed with a draught of 18 ft. 3 ins. to the westward of the buoy. It should be observed that steering inside a channel buoy can only be justified in order to avoid immediate danger."

Now dealing with that last answer first, I entirely agree that as a general rule a vessel ought not to pass inside a channel buoy. But if it be a question of either passing inside a channel buoy in ample water or having a collision, because if the vessel goes on she will run into another ship, I have no doubt whatever that she ought to pass inside the buoy if there is plenty of water, as there was in this case. I quite agree that it is dangerous to pass too near a buoy. We cannot have a better example of that than the next case in these appeals (*The Segundo* (1)), where a vessel in the Tyne did pass too near a buoy and stripped all the blades off her propeller by catching the chain, and such a contingency must be taken into account. But in this particular case, if the alternative was running into the *Archon* because she was

(1) Unreported,

too near the buoy, or going inside the buoy with perfect safety just as the *Batavier* did, with an experienced pilot on board, I have no doubt that that course should be adopted.

As to the first part of the answer of the assessors, the five-sixths of a cable within which they say the *Treherbert* could have passed, though it was rather risky navigation, is arrived at by taking the place fixed by the judge at north of the buoy exactly two cables, and then drawing from that place of collision the course which the *Archon* was steering. But there is great indefiniteness in the judge's finding of the place of collision: "I am accordingly satisfied that this collision took place somewhere about two cables to the northward of the N.E. Spit buoy. It may have been a little more, but I do not think it can have been anything less. Whether the buoy bore exactly due south from the place of collision, or a little west, or a little east of south, again I do not pretend to determine, but I am satisfied, after weighing all the credible evidence, that the collision took place to the northward of the buoy, and not less than two cables from the buoy." Obviously, with a position so vaguely described as that, it is quite impossible to draw a line from any named place and get the exact distance at which the *Archon* could pass the buoy at five-sixths of a cable, particularly as the learned judge finds "certainly more than one cable" as the distance the *Archon* passed the buoy. He finds this: "I think the probabilities are—and I am prepared to find as a fact—that he passed the N.E. Spit buoy at some distance not more than two cables; I think he probably passed it at a distance of somewhere between one and two cables." We have put in our question a cable and a half, i.e., considerably more than the five-sixths of a cable which the assessors, by drawing a collision at a fixed point north of the buoy, have found to be the room in which the *Treherbert* could have passed, though it was a matter of some little difficulty of navigation.

Now if that be the true state of things, the *Treherbert* could have avoided this collision at a time up to the last moment—a time when the *Archon* was still keeping her course and speed,

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and we have had some difficulty with the cross-appeal, which condemns the *Archon* for not acting under the Note to art. 21. I have had that Note before me many times, and it is very troublesome to construe and act upon in particular cases. "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed"; and the Note is this: "When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." One of the most instructive cases in which that Note has been considered is *The Albano* (1), where Lord Gorell, in giving the decision of the Privy Council, said: "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this." That is the way in which I always approach this Note.

Now in this case I have formed the view, and the answer given us by the assessors confirms it, that with reasonable care the *Treherbert* could have avoided the collision by going either east or west of the buoy, and that consequently the moment had not arrived when it was necessary for the *Archon* to alter her course and speed until it was perfectly obvious that the *Treherbert* was in fact not doing anything that would help anybody, but was coming straight on. The learned judge, in rather an obscure passage, has found the *Archon* guilty of not acting soon enough. He has not expressly stated whether the action that she ought to have taken was

(1) [1907] A. C. 193, 207.

to alter her speed or whether it was to alter her course, but he has found that she did not take some action, unspecified, as soon as she should have done. I think there is some corroboration in the note taken by Mr. Willmer that the point was taken by Mr. Digby in his reply, but I am bound to say that I should have expected the point to have been much more definitely put to the pilot of the *Archon* than it was in fact put in cross-examination. I think one reason why it was not definitely put was that the case for the *Treherbert* was quite different. Her case was that the *Archon* ported into her instead of keeping course and speed. That contention has hopelessly failed. Anything more unsatisfactory than the evidence of the pilot, master, and look-out man on the *Treherbert* I find it difficult to conceive, and I entirely agree with the view which the learned judge has taken of that evidence. Putting that aside for the moment, and coming back to this point, on the assumption that it was taken though not taken very strenuously, I am unable to agree with the view taken by the learned judge that the *Archon* is to blame under the circumstances for not acting earlier. I think that the *Treherbert*, up to the time that the *Archon* acted, could have avoided the collision easily by her own action, and if that be so, there was no necessity on the part of the *Archon* to act earlier than she did. In my opinion, therefore, the cross-appeal must be allowed and the *Treherbert* held alone to blame for this collision.

LAWRENCE L.J. The case made by the *Treherbert* at the trial was not that the *Archon* had set a course too close to the N.E. Spit buoy or had in fact come too close to that buoy, but that having reached a position of safety in the accepted way, she suddenly ported towards the *Treherbert* and thereby brought about the collision. Langton J. in his judgment says: "The case which the *Treherbert* puts forward is this. The pilot was quite explicit about it (he was given every possible opportunity) and he said that he saw the *Archon* coming on in such a position as would give him opportunity to pass in safety red to red, that is to make

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his turn in the usual way. He did not see the *Archon* coming too close to the buoy in the first instance. He saw her, as he thought, leaving him ample room, and most explicitly, and testing him in every possible way as Mr. Raeburn did, and as I myself did at a later stage, he said that the cause of this collision was not that the *Archon* set an original course too close to the buoy, but that the *Archon*, at a late stage of the proceedings, ported her wheel and ported towards the *Treherbert*. In other words, that having reached a situation of safety by quite competent seamanship in the ordinary and accepted way, she quite suddenly determined to make a position of foolish danger by directing her course towards the ship which she should have been attempting to pass. I have had to determine upon his evidence, and upon the evidence of the ship's company which supported him, whether that is true."

The learned judge, after carefully reviewing the evidence, came to the definite conclusion that the *Archon* did not take any such port helm action as was imputed to her by the *Treherbert*, and he truly observes that, to put the matter in a vivid phrase, that finding knocks a considerable hole in the story of the *Treherbert*, and she then comes before the Court in sad case. I entirely agree with the learned judge in taking that view of this part of the case. The *Treherbert*, however, in no way daunted, and ignoring the inconsistency involved, contended, I suppose as an alternative case, that the *Archon* passed too close to the buoy, having regard to the fact that she was in a place where the narrow channel rule (art. 25) applied, or at all events, in a place where there was an accepted custom that an incoming vessel should give room to enable an outgoing vessel turning southward to pass between her and the buoy. I agree with the learned judge that art. 25 has nothing to do with the case. The word " channel " denotes a depression between two banks or ridges having a definite boundary on each side, and a narrow channel is a channel in which the two boundaries are close to one another. The expression " narrow channel " in art. 25 is, to my mind, wholly inappropriate to describe the place where

this collision occurred. The N.E. Spit buoy is placed where it is in order to mark the turning point for vessels inward and outward bound either from or towards the south, and it cannot in any sense be described as marking one side of a channel, regard being had to the fact that the other side is open to an indefinite extent. Equally, in my judgment, the contention that the buoy marks an approach to a narrow channel cannot hold good. The channels in the estuary of the Thames consist of three or four main channels, all of which converge and lead into a wide basin or expanse of sea in which the buoy in question is placed. In my judgment, *The Harvest* (1), a case of collision on the Tyne, is quite inapplicable to such a place as that.

I agree entirely with the learned judge's conclusion that the governing rule in this case is the crossing rule (art. 19). Under that rule the *Treherbert* was the give-way ship, and the *Archon* was the stand-on ship. It was therefore the duty of the *Treherbert* to keep out of the way of the *Archon*. It was contended, however, on the part of the *Treherbert* that at that place there was a local practice of pilots that the incoming vessel should give room for any outward bound vessel bound southwards to pass between the incoming ship and the buoy, and that in this case the *Archon* did not comply with that practice and did not leave sufficient room for the *Treherbert*.

The first observation which occurs to me is that such a practice cannot override the crossing rule, but I agree with my Lord that the practice does not conflict with, nor was it intended to override, the crossing rule. In fact, as my Lord has pointed out, it assists the vessels inward and outward bound at this point to pass one another port to port. The learned judge held in the present case that without any negligence on the part of the pilot of the *Archon* she did not, owing to the set of the tide and the wind, in fact leave sufficient room for the *Treherbert* to pass in safety between her and the buoy. In view of the advice that we have received from our assessors, I very much doubt whether that

(1) 11 P. D. 14.

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finding was correct. As a landsman I do not profess to have any acquaintance with seamanship, but to say that a space of 300 to 400 yards between a buoy (which after all is only one point and will be passed in a ship's length) and an incoming ship is insufficient for a vessel of the size of the *Treherbert* to pass through with safety, rather astonishes me. Our assessors say that with careful or close navigation there was sufficient room. But assuming that there was not, and bearing in mind that the crossing rule applies, how can it be said that the *Treherbert* was justified in going full speed up to a point when she could not see whether there was room enough for her to get through safely without attempting to reduce her speed, and then, finding that there was insufficient room, according to her story, between the vessel and the buoy, running into the on-coming vessel instead of either attempting to take such close navigation between the two points as was actually left to her, or going to the westward of the buoy, where there was plenty of water for her? We are advised by our assessors, and it seems reasonable, that to go the wrong side of the buoy is a course which should not be adopted unless there is imminent danger. The *Treherbert's* case was that there was imminent danger, and although there was ample water to go to the other side, for some reason which is wholly inexplicable to me, she chose the course of running into the *Archon* rather than infringing the direction that ships ought not to pass on the wrong side of the buoy.

Mr. Willmer raised a point which rather startles me. He said that as the pilot of the *Archon* had got out of his reckoning when he set his course two miles northward of the Elbow and found himself close to the buoy (I think he said within a mile of the buoy), he ought to have starboarded his helm to get back on the course which he had set all that distance away, and to have taken that helm action without even sounding any signal to the on-coming ship. It seems to me that such a doctrine would be dangerous and wholly contrary to the rules of navigation. The *Treherbert* could not tell what course had been set or how much the *Archon* was out of her reckoning; all she could see was the course on which

the *Archon* was actually proceeding at the time when she had got near the buoy. The *Treherbert* could then judge the course and the speed sufficiently to enable her to keep out of the way. The rule that the stand-on ship must keep her course and speed is enacted in order that the give-way ship can take such measures as she thinks advisable to keep out of the way of that ship. The give-way ship has no knowledge of the course which has been set by the master of the stand-on ship or of what helm orders have been given, but she can see the course on which the vessel is actually proceeding at the time when she is approaching her, and, if helm action had been taken by the *Archon* such as suggested by Mr. Willmer and a collision had occurred, it is plain that she would have had no defence.

There only remains the cross-appeal. Mr. Digby, with his usual frankness, admitted that at the trial that was one of the minor points in the case. I have already stated what was the real case made by the *Treherbert* at the trial, although it is true to say that it was suggested that the *Archon* did not act soon enough in stopping her engines, when she was in the agony of collision. No question, however, was put to the pilot of the *Archon* on this subject, and it seems to me that it would be unfair to condemn him for not having taken action soon enough, without giving him any opportunity of explaining why he did not take action sooner. There may have been many reasons why he did not do so, and it has to be borne in mind that this is a question of good seamanship in the particular circumstances. I need not dwell on the difficulty the master of a vessel, which is bound to keep her course and speed till the last moment, is under in determining when the moment has arrived to take action and what action ought to be taken. It is curious to note that Mr. Digby's case is that the *Archon* ought to have taken action before she heard the one blast from the *Treherbert*—and, according to the *Treherbert's* account, that blast was sounded when the vessels were within a quarter of a mile of each other, and to compare the case so made with

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The Ulrikka (1), where the stand-on ship was held negligent for having altered her course when she was three cables from the give-way ship, and was condemned for having acted too soon. That is only one instance; although there are many others in the reports, I do not think there is a single case in which the pilot or the master of the ship has not been given the opportunity to explain why he delayed the action he did eventually take, and yet has been held to have taken action too late. In my judgment there is no evidence in the present case on which the learned judge could properly have found that the action taken by the pilot of the *Archon* was taken too late. There is no question here that when he did take action he took the right action, that is to say, he starboarded, but the charge against him is that he did not give the order to starboard the helm soon enough. In my judgment there is no evidence to support that charge.

I agree, therefore, that the cross-appeal succeeds, and that the main appeal should be dismissed.

GREER L.J. I am of the same opinion, and having regard to the fact that the mind of the Court goes 75 per cent. of the way the learned judge took, it is not treating him with disrespect if I deal quite shortly with the other 25 per cent.

With regard to the case made by the *Treherbert*, I am satisfied that the argument which has been presented to this Court, to persuade us that the crossing rule did not apply, ought to be rejected. It is conceded that the crossing rule applies unless the collision took place in a narrow channel or in some space of water which has by custom of navigation become equivalent to a narrow channel.

Now it is quite clear, and beyond argument, that in the ordinary sense of the word this collision did not take place in a narrow channel. A channel with only one side of it indicated, and many, I might almost say hundreds, of miles, which can be used upon the other side, cannot by any stretch of language be described as a narrow channel. But it is said that there are authorities which show that a vessel which is approaching a narrow channel may have to take the same

(1) 13 Ll. L. R. 367.

kind of action, having regard to the need for skilful navigation, as she would take if she were actually in the channel. That I take to be the effect of cases like *The Kaiser Wilhelm der Grosse* (1), where the vessel was just approaching the place where she would have to go between two moles and into a narrow channel, and where it may very well be that good seamanship directs that the position is to be treated as if she were already in the channel and not treated as a case of crossing ships. But those decisions have no application whatever to the present case, where the vessels were a very long way from anything that could be described as the entrance to a channel. The object of art. 25, applying to narrow channels, is the same as the object of the crossing rule ; it is in order to secure that the vessels shall pass port to port. It is secured in one way by the crossing rule ; it is secured in another way by the provision in the narrow channel rule that each shall keep on her own starboard side.

Looking at the case broadly, I think the cause of this collision was the bad look-out kept on the *Treherbert*. The point which the *Treherbert's* witnesses made was that the ship was put into an impossible position by a vessel, which was coming towards them, porting towards the buoy in a way in which she ought not to have been coming—porting almost as much as to bring her over four or five points—and it was because of that situation that they were unable to avoid the collision. The learned judge has found, and I entirely agree with his finding, that no such porting ever took place. All that happened was that when the *Archon* was, I think, about two miles from the Elbow, she altered her heading in order to counteract the set of the tide, which was on her starboard side. In my judgment, from the time that she altered her heading until the time immediately before the collision, she kept her course and speed. I agree with the view which has been expressed by Lawrence L.J. that if after that time she had altered her heading, she would have failed to keep the course which was determined partly by her heading and partly by the set of the tide, a course which was obvious on

(1) [1907] P. 36 and 259.

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a clear night to the approaching vessel if she had kept a good look-out.

In these circumstances it seems to me clear that the learned judge had no option but to put the principal blame for this collision upon the *Treherbert*: and the only other question on which I desire to say a word or two is as to whether he was right in his view that some blame must be attached to the *Archon*. Now I regard the general rules applying to negligence on land as applicable to negligence on the sea, and if a vessel knows that the other vessel is doing the wrong thing, and notwithstanding that, continues to be negligent in her own action towards the other vessel which she knows to be doing something wrong, then the action of the first vessel is the effective cause of the collision, and she ought to pay for the whole of the damage thereby caused. Applying that to this case, assuming that the *Archon* was doing something wrong, although the learned judge has found that she was not, in the course which she kept until she got opposite to the Spit buoy, still if the *Treherbert* by careful navigation could have avoided the collision and did not do so, then she, and she alone, is responsible for the consequences. But in this case we have to deal with the Note to art. 21, which puts an onus on a vessel at a time when it meets a wrong-doing vessel, to do its best to avoid a collision; that is to say, the vessel which is ordered by the rule to stand on, must not continue to stand on in such a way as to make the collision inevitable, if she has a reasonable opportunity and knows that the give-way ship is not going to give way so as to avoid the collision: a duty is then put upon the stand on vessel to do her best in the circumstances. This is an extremely onerous duty and very difficult to perform, because the stand-on vessel is supposed to keep her course until the very last moment, until the moment when she can reasonably judge by some action that the give-way ship is not going to do the right thing to avoid the collision; then the stand-on ship must cease obstinately to stand on and must take some measures of her own to avoid the collision.

I am satisfied in this case that there is nothing that would

justify a conclusion that the stand-on ship failed at the right moment to come to a decision that it was necessary for her to act, but unfortunately, when she did act, that was not sufficient to prevent the negligence of the other vessel resulting in a collision between the two. I agree with Scrutton and Lawrence L.JJ. that the cross-appeal must be allowed with costs.

Solicitors for the appellants : *Thomas Cooper & Co.*

Solicitors for the respondents and cross-appellants : *Constant & Constant.*

E. C. M. T.

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Nov. 9, 10, 13; *Dec.* 21.

Shipping—General Average—"Extraordinary sacrifice . . . . intentionally and reasonably made"—Placing ship against pier—Heavy damage occasioned to pier and ship—"Voluntary stranding"—York/Antwerp Rules, 1924.

By Rule A of the York/Antwerp Rules, 1924, "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Rule 5 is in these terms : "*Voluntary Stranding.* When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore shall be made good as general average."

A steam vessel, laden with a cargo of coal, anchored three or four lengths from a pier. During a gale she began to drag, her port cable parted, and she dragged closer to the pier and was unable to get head to sea and steam away. The master feared that if he let the vesels drag ashore she would lose her propeller and possibly break her back ; and she was so close to the pier that if she attempted to turn head to sea there was danger of striking the pier with her stern and damaging the propeller. The master accordingly decided to put the ship broadside against the pier, using it as a lever to get the ship's head into such a position that he could steam out to sea. While carrying out this manœuvre the vessel was grinding against the pier and also bumping upon the ground, and damage to the extent of over 14,000*l.* was occasioned to the pier and the ship. The shipowners claimed that this sacrifice was incurred in the course of a general average act and that

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they were entitled to a contribution from the insurers of the cargo:—

Held, that although the vessel bumped on the ground there was not a voluntary stranding within the meaning of r. 5; that there was an extraordinary sacrifice intentionally made; that the action was reasonably taken; and that there was a general average act in respect of which the plaintiffs were entitled to contribution.

GENERAL AVERAGE.

The plaintiffs, the Pool Shipping Co., Ld., owners of the steamship *Seapool*, claimed contribution for general average from the defendants, the Northern Maritime Insurance Co., Ld., who had insured a cargo of coal laden on board the vessel. The cargo was carried from the Tyne to Bagnoli, Italy, upon the terms of a charterparty which provided (inter alia) that average, if any, was to be settled according to the York/Antwerp Rules, 1924. (1)

On January 1, 1932, the *Seapool*, while at anchor off Bagnoli, in consequence of sudden bad weather commenced to drag her anchors and to drift towards Ilva pier and the shore. The plaintiffs, in their statement of claim, alleged that in order to prevent the stern of the *Seapool* striking the pier, with the certainty of damaging her rudder and propeller and stranding, and the probability of ship and cargo becoming a total loss, the *Seapool* was voluntarily and deliberately manœuvred so that she fell with her port side about midships against the pier. In consequence of striking the pier the *Seapool* and the pier received damage and the plaintiffs became liable to pay, and paid, for the damage to the pier.

By the defence it was denied (inter alia) that the *Seapool* was voluntarily and deliberately manœuvred so that she fell against the pier; and, in the alternative, it was alleged that, if she was so manœuvred, such manœuvre was unreasonable. In the further alternative it was alleged that the *Seapool* would inevitably have driven on to the pier or stranded.

The facts are summarized in the headnote and are fully set out in the judgment.

(1) The material portions of the Rules are summarized in the headnote and are set out more fully in the judgment. The Rules will be found printed in extenso as a note to *Vlassopoulos* v. *British and Foreign Marine Insurance Co.* [1929] 1 K. B., at p. 202, and in "Carver's Carriage of Goods by Sea," 7th ed., appendix C.

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W. Norman Raeburn K.C. and *Kenneth Carpmael* for the plaintiffs. The master of the *Seapool* elected to transfer the risk to the ship alone by hitting the pier with the vessel's side instead of with her stern, an alternative which would have certainly caused damage to the rudder, and the vessel would probably then have gone ashore and been lost together with the cargo ; and the same result would have occurred if the only other course had been taken—namely, to put the vessel or allow her to drag ashore. It was a sacrifice intentionally made in order to preserve the whole property at risk, and that is a general average act within the York/Antwerp Rules.

This is a stronger case on the facts than *Austin Friars Steamship Co.* v. *Spillers & Bakers, Ld.* (1), on which the plaintiffs rely in particular on the judgment of Pickford L.J. ; there was no certainty that the ship would hit the pier, and the loss was not inevitable in any event.

[Reference was made to Carver's Carriage of Goods by Sea, 7th ed., sec. 388; Arnould's Marine Insurance, 11th ed., sec. 942; and to the Marine Insurance Act, 1906, s. 66.]

C. T. Le Quesne K.C. and *J. V. Naisby* for the defendants. The master made no conscious election at the time; it was an afterthought. But if, contrary to the defendants' contention, he did intentionally take the manœuvres described, the plaintiffs still have not proved their case. The vessel was bound to hit the pier, and even if, by the deliberate act of the master, she hit it with her midships instead of with her stern, that is not a general average act. Further, running on to a pier attached to the shore is equivalent to running ashore ; it was a "stranding," and the circumstances were such that even if the vessel had missed the pier she would have driven ashore ; damage caused by the ship being intentionally run against the pier, in these circumstances, brings the case within Rule 5 of the York/Antwerp Rules, and a contribution in general average is not recoverable. The actual disaster must be another than the one impending ; here it was the same disaster. At best it was a choice between two inevitable evils, and the election to choose one rather

(1) [1915] 1 K. B. 833 ; [1915] 3 K. B. 586, 591.

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than the other does not found a claim in general average. In *Austin Friars Steamship Co.* v. *Spillers & Bakers, Ld.* (1), the choice was not between two inevitable perils; and the observations of Pickford L.J. are strongly in the defendants' favour.

The plaintiffs also must satisfy the Court that the sacrifice was "reasonably" made. It would have been better to let the ship drift ashore, and if her counter had come in contact with the pier instead of her broadside it would have enabled the ship to get to sea, just as in fact she did, and much less damage would have been done.

Raeburn K.C. in reply. "Stranding" is a very technical term and involves settling on the shore. The *Seapool* always remained afloat, at most she bumped on the ground occasionally while grinding against the pier in the swell. The risk from which the master extricated himself by his manœuvres was a risk to the whole adventure, ship and cargo; the cargo might have been totally lost; the master transferred the risk to the ship alone, and no loss at all was occasioned to the cargo. The sacrifice was "reasonably" made, though "reasonably," it is submitted, only refers to expenditure incurred and not to sacrifice made. The alternative was the prospect of total loss or heavy salvage expenses. The fact that the ship was damaged to an unexpected extent is immaterial: see *Norwich, &c., Co.* v. *Ins. Co. of N. America.* (2)

[Reference was also made to *Barnard* v. *Adams.* (3)]

Cur. adv. vult.

Dec. 21. LANGTON J. This is a claim to contribution for general average. The plaintiffs are the owners of the steamship *Seapool*, and the defendants are insurers of a cargo of coals carried on board her. The *Seapool* is a single-screw steamship of 4549 tons gross, 392 feet long, 36 feet beam, and with a dead-weight carrying capacity of 8083 tons. She was laden with a full cargo, and on the voyage in question

(1) [1915] 1 K. B. 833; [1915] 3 K. B. 586, 591.

(2) (1902) 118 Fed. Rep. 307.

(3) (1850) 10 How. 270.

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was proceeding from Dunstan, in the Tyne, to Ilva Pier at Bagnoli, which lies in the Bay or Gulf of Pozzuoli, on the west coast of Italy. The charterparty under which the coals were carried provided that average, if any, should be settled according to the York/Antwerp Rules, 1924.

Both the facts and law have given rise to acute controversy and both have caused me some doubts and hesitation. The facts as I find them are as follows :—The *Seapool* arrived off Bagnoli on December 31, 1931, at 11.30 P.M. On that night she was anchored in a position of apparent security by a local pilot under the shelter of Nisida Island. Both her bower anchors were laid out, with 60 fathoms of cable on the starboard anchor and 45 fathoms on the port anchor. The wind at that time was from the S.S.E., a fresh breeze, and the *Seapool* lay heading to the wind. She was anchored in a position about 400 to 500 yards north of the light on Nisida Island, and in that position she lay about three and a half to four of her own ship's lengths to the southward and westward of Ilva Pier. Early in the morning of January 1, 1932, at about 3 A.M., the wind, which had veered from the S.W. and increased in force, began to blow with squalls, of gale force. A certain amount of sea got up in the comparatively narrow waters of the bay, and at the same time a swell from a rather more westerly direction than the wind began to come in from outside the bay.

In these circumstances, the *Seapool* began to drag her anchors. Two shackles from a chain were let out on each anchor, but, either because the scope of cable was unequal, or because the port cable was the weaker, the port cable carried away. At the time that the port cable carried away, the vessel had drifted about two lengths to the N.N.E. The engines had been kept with steam on and with a pressure of about 165 lb. on the main boilers, out of a possible 180 lb. When the cable carried away the engines were ordered full ahead, with the intention of steaming to sea. After the port cable parted, the vessel dragged still closer to the pier, but the engines eventually checked the drag at a time when the vessel was still distant from the pier about two-thirds of her

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length, and with the end of the pier somewhat forward of her port beam. In this position, it will be seen that she had but very scanty room in which to make the necessary manœuvre to get head to sea by porting her helm. I do not know whether it would be right to say that she was broadside to the wind, but she was in a position in which the wind was on her starboard bow, and it was therefore impossible for her, unless she could get the wind on her port bow, to steam up to her anchor, get her anchor, and get to sea.

The master of the *Seapool* gave a careful, and to my mind a trustworthy account of his subsequent manœuvres, and described in great detail the kind of dilemma in which he was placed. He said the alternatives before him were "(1.) to let my vessel drag ashore, (2.) to attempt to turn to sea, and (3.) to let my vessel drift broadside on to the end of the pier. Of those three, the worst, in my view, was to let my vessel drift ashore. I should then possibly lose my propeller, almost certainly damage my rudder and, possibly, break my vessel's back by bumping on the shore. The one that was, at first sight, the most attractive, was to try and turn under port helm, get the wind on the port bow, and steam away. But I was already so close to the pier by the time I had considered this manœuvre that there was a danger of striking my stern with the somewhat vulnerable counter, and with the risk of damaging my propeller and my rudder, against the pier. The third alternative was the one which I adopted, which was to go ahead at first on the engines, then stop the engines, and let the weather drift her, as gently as I could manage it, with her broadside against the end of the pier." He did outline a further alternative of steaming past the pier and attempting to turn to sea to the southward of the pier, but I rather doubt whether that alternative was clear in his mind at the crucial moment.

The master of the *Seapool* was corroborated in all essentials, in his description of the events, by an exceptionally able and experienced chief officer who at the time of giving his evidence in this Court was himself the master of the *Seapool*. To my mind, he was an excellent witness, and so far as one

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can see he had nothing to gain by supporting an untrue story, and nothing to fear (since in any case he was not responsible for the misfortunes of the *Seapool* on this occasion) from telling the truth, if it happened to be other than what the master had described.

I think that it is quite possible, in working the matter out during the day in comparative calm and safety on the other side of the bay, that the story which they then put down (and it is material to note that they did put it down the same day) has acquired certain definite edges and probably perfections of detail, which were perhaps not present to their minds when faced with a sudden emergency in the early morning of January 1st.

Both were subjected to a most careful and thorough cross-examination, and both these two witnesses—and subsequent witnesses—in their evidence revealed some divergencies of time and detail. Doubts were thrown by this cross-examination upon actual positions, upon the exact direction of the swell, upon how the seas were breaking over the ship, and how logs came to be written, erased, and re-written, and upon what was said, and what was omitted, in letters written and protest made concerning the events. I have weighed all that as carefully as I can; I have weighed the demeanour of the witnesses whom I saw and heard; and weighing them all up as carefully and conscientiously as I can, I do not think that those criticisms, reasonable and moderate as they were, shake the belief that I felt in these witnesses when they were giving their evidence. I am much strengthened in my view of their credibility by the fact that it is difficult to see why this story should have been invented—it is a daring and original story—for no particular purpose if it be untrue. A much simpler story for the master and mate—who are both of them very intelligent people—would have been to make a case of overwhelming disaster. They would simply have said: "We were flung on the pier, we had not any chance, the gale got up very suddenly, and no precautions that seamen could have taken could have prevented disaster." There seems no reason for this elaboration, this instant

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elaboration the very same day, in very considerable and careful detail, and I have come to the unhesitating conclusion that the broad features of these stories are true.

The leading feature of the story is that there was a consultation between the master and chief officer on the bridge of the *Seapool* as to what should be done in the circumstances, in what I have described as a triple dilemma, which presented themselves. The fact that there was such a conversation is confirmed by one of the other officers who was on the bridge, but the broad feature of the conversation is this. The master proposed, and the chief officer agreed in the proposition, that the best thing to do was not to attempt to swing the ship and thereby jeopardise the propeller and rudder by striking the pier, but consciously to allow the ship to drift with her broadside against the pier. That is the conversation which has been spoken to in great detail, and confirmed by the chief officer and which I believe actually took place, and it is perhaps noticeable that in that conversation I did not hear anything of the suggestion of sliding past the pier and turning to the southward. That suggestion, it seems to me—without discrediting anything which the master and chief officer have said—may well have been one of the details which crept into their minds in the comparative calm of Baia on the other side of the bay.

At the time that this decision was taken the master must have known—and indeed does not pretend not to have known—that very serious danger to the ship would quite possibly result and some probable damage to the pier, by the course which he was electing to take. To put a ship broadside against a pier, which must have been for these purposes a grinding wall, is not a course which any master is at all anxious to follow, but the alternatives with which he was presented—drifting ashore or trying to swing, and thus doing damage to the vital portions of the ship—the propeller and the rudder—were even worse, and might have resulted in worse damage, not only to the ship but also to the cargo, and I think that the master might quite reasonably weigh, at that moment, that the damage he was going to do by driving against the pier

at least would not result in damage to the cargo and might not damage the ship vitally. I feel, therefore, that I am on reasonably sure ground when I say that the alternative present to the mind of the master at the time when he took this decision was an alternative of striking the pier or of going ashore, and of those two things he preferred and elected to take the evil of striking the pier. That it was no light evil is shown by the fact that the damage done to the ship was no less than 6719*l.* and the damage done to the pier has been assessed, as I understand, at 7898*l.* But having taken this alternative of allowing his ship to drift against the pier and to grind against it, he was enabled by manœuvring his engines to get into a position to the north side of the pier and by that means to get his vessel with the wind on her port bow, and thus was able to steam ahead, pick up the 90 fathoms that still remained of his starboard cable, and get away to the other side of the bay. He steamed straight across the bay into the wind, and lay in perfect safety off Baia on the other side of the bay.

Those are the facts on which the point arises as to whether there is a good claim for general average, and since the parties agreed to be bound by the York/Antwerp Rules of 1924, it is to that code that one must turn in order to solve this point. The important rules for the purpose are Rule A, Rule E, and Rule 5. Taking first Rule E, " The onus of proof is upon the party claiming in general average to show that the loss or expense claimed, is properly allowable as general average." As to the effect of this rule in the present case, there is no dispute. The plaintiffs agree that the burden is upon them. Taking next Rule 5, it bears the heading: " Voluntary stranding," and is in these terms: " When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as

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general average." Upon that Rule, Mr. Le Quesne, on behalf of the defendants, claimed that this was a voluntary stranding by the master, in that running the ship against the pier, or allowing the ship to drift against the pier, was, within the terms of the Rule, intentionally running on shore. His contention was that the pier, being attached to the shore, was part of the shore and therefore that if a ship were allowed to run against a pier it was the same as if she were running on shore. If that were a good argument I think it would follow, as Mr. Le Quesne contended, that this would not be a good claim in general average.

On the other side, however, it was contended that " stranding " is a well known term. It is a term that occurs both in Continental law and in English law, and it has a well ascertained meaning. " Stranding " means going with the bottom on the shore, and for my part I have always so understood it. I find it difficult to imagine that anybody could consciously have used language such as this if they had intended to include running a ship against the end of a pier, while the bottom of the ship was clear of the ground. It is true that some colour may be lent to the argument by the fact that in this particular case the ship appears to have bumped upon the ground whilst she was lying against the end of the pier, but, apart from that—which seems to me an extraneous circumstance—I see very little colour in this argument at all. The York/Antwerp Rules, 1924, were, to my certain knowledge, debated for a very long period before being finally settled, and the language of the Rules was canvassed and chosen with quite unusual care. It was language chosen by people who were peculiarly conversant with, and peculiarly interested in, maritime matters and especially in maritime casualties, and I cannot think that they would have framed a rule and headed it " Voluntary stranding " if they had not meant to use the word " stranding " in what I have called the ordinary sense. Therefore I think there is nothing in this point, and I do not think that Rule 5 applies to the present circumstances.

One, therefore, is driven back to Rule A, which says: " There

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is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure." Now the words of Rule A are, to my mind, not at all easy of interpretation, and I am sorry to say that no very great guidance from either the masters of the law or the prophets of the text-books, can be obtained to enlighten one as to the exact meaning of the Rule. Where the masters of the law have spoken they have spoken with truly masterly caution upon this somewhat difficult subject, and where the prophets have spoken and written they have spoken with a wealth of disagreement that would do credit to doctors, so that I have been driven back very much upon my own resources in interpreting the meaning of Rule A. As showing the caution with which this subject has been approached by the masters of the law, I may take the decision of Lord Sterndale in a case which was pressed upon me with almost equal vehemence by both sides—*Austin Friars Steamship Company* v. *Spillers & Bakers, Ld.* (1) Mr. Raeburn, on behalf of the plaintiffs, cited this case to me as providing excellent material for the construction of an a fortiori case—in the present instance a kind of fulcrum upon which he might turn his ship and get her head to sea. Mr. Le Quesne, on the other hand, seized upon it equally eagerly as affording a wealth of material for distinction, and as showing that this particular act was not a general average act, although the act in *Austin Friars Steamship Company* v. *Spillers & Bakers, Ld.* (1) was decided so to be. When I looked for guidance on the main point—that is to say some enlightenment as to the meaning of Rule A—I found only this somewhat cold and comfortless phrase from Pickford L.J. (as he then was): "I do not think it is necessary to lay down any general principles of law as to what is a general average act in the case of voluntary stranding, but in the circumstances of this case it seems sufficient to say that in my opinion this was a general average act."

(1) [1915] 1 K. B. 833; [1915] 3 K. B. 586, 591.

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Turning from that rather comfortless dictum, I have studied the works of Mr. Carver and Mr. Lowndes, but again I am afraid without very much enlightenment. A statement in Carver's Carriage of Goods by Sea, taken from the 7th ed., at p. 545, s. 386, commended itself to me as being the clearest exposition that I could find. It is in these terms : " Where a common danger to the whole adventure has arisen, not from ordinary incidents of the voyage but accidentally, and the master has intentionally sacrificed something to avoid that danger, we have the ingredients of a general average act. There must be an extraordinary common danger, and a conscious giving away of something to meet it." That, when compared with Rule A, seems to me to be a fair expansion, although perhaps not much of an expansion, of the rule itself—an expansion in the sense of making it a little clearer what the words of Rule A probably mean.

I think the best thing I can do in this case is to follow the caution of the masters of the law and to confine myself to interpreting as closely as I can the meaning of Rule A, and frame my finding accordingly. Was there then in this case any extraordinary sacrifice ? I think there was. I think that the master did " intentionally "—that is also one of the words of Rule A—" intentionally " sacrifice a portion of his ship. I think he made his conscious act of putting his ship against the pier, and I think that by so doing he intended to, and did in effect, succeed in transferring to the ship alone what was a peril to the entire adventure. If he did this, and did it with his eyes open to what he was doing, that seems to me to comply with the real underlying meaning of Rule A. He was confronted, as it seems to me, with the alternative of certain damage to his ship and probable damage to the pier, as against a problematical worse damage to the whole adventure, and he elected to take the first of the two alternatives. He certainly did succeed in preserving his cargo from any loss or damage, and if it be necessary to decide —I am not sure that it is—whether his action was reasonably taken in the circumstances, I think that it was a reasonable course to take. I am not certain whether it is necessary so

to decide, because Mr. Raeburn put forward the argument that perhaps "reasonable" in Rule A only refers to expenditure, and that the Rule should be read: "when any extraordinary sacrifice is intentionally made, or when any extraordinary expenditure is reasonably made." I do not know whether that is, or whether it is not, the correct reading, and I do not know that it is necessary so to decide, because, as I have said, I think that this was a reasonable thing for a seaman to do in the circumstances. I have put this point to the Elder Brethren for their consideration, and I think it is fair to say that they are not enthusiastic about the master's action in taking this alternative. They point out to me—and I have weighed it very carefully—that to put a vessel's side, more especially in the way of her engine-room, against the hard structure of a pier, in a swell, which necessitated that she would grind against the pier, is taking a very serious risk. But against that I am impressed with the unknown danger—always perhaps more terrible to a shipmaster—of letting his ship go on to the ground. The fate of vessels which take even a sandy beach is various and difficult to forecast; sometimes very little damage is done, sometimes the worst possible damage is incurred, and the vessel—as the chief officer I think in this case predicted would have been the case—breaks her back. It is an unknown, and for that reason alone a terrible danger to allow your vessel to go on sand, the nature and consistency of which you do not know. Therefore the Elder Brethren are, to this extent, with me in that they do not think that it was an unreasonable thing for the master to have taken this step. I go a little further than that, and I think that it was a reasonable thing to do with the time at his disposal and the knowledge of the circumstances which were at his disposal. He had not been there on this occasion for more than a few hours of darkness, and although he had been there apparently as an able seaman some eighteen years before, it is unlikely that he made any special study of the sands which were on this latter occasion under his lee.

In my view, therefore, this is a general average act and an

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extraordinary sacrifice was intentionally and reasonably made for the common safety, and for the purpose of preserving from peril the whole property involved. The plaintiffs, therefore, are entitled to succeed.

Solicitors for the plaintiffs : *Botterell & Roche, for Temperley, Tilly & Hayward, West Hartlepool.*

Solicitors for the defendants : *Lightbounds, Jones & Bryan, for Ingledew & Co., Newcastle-on-Tyne.*

E. C. M. T.

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Nov. 22, 23.

BAINBRIDGE *v.* BAINBRIDGE.

(THE KING'S PROCTOR SHOWING CAUSE.)

Divorce—Practice—Adultery of petitioner—Discretion of Court to grant Decree—Perjury of petitioner in denial of adultery—Intervention of King's Proctor—Absence of special circumstances—Refusal to exercise discretion in favour of petitioner—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178, *sub-s.* 3.

Deliberate perjury committed by a petitioner in denying his or her adultery and wilful deception of the Court by a party asking for the exercise of its discretion to grant a decree come within the mischief of the general considerations laid down in *Apted* v. *Apted and Bliss* [1930] P. 246. This is specially the case where none of the special circumstances exist which have been held to justify the Court in exercising its discretion.

A decree nisi granted to a petitioning wife was rescinded on a finding on a King's Proctor's intervention that she had committed perjury in denying her own adultery with A. On a second petition by her she asked for the exercise of the discretion of the Court in her favour in spite of the finding of adultery with A., which she again denied. She further swore that she had not committed adultery with any man. She was believed, and a decree nisi was again pronounced. On an intervention by the King's Proctor in the second petition she was charged with a course of adultery with B. and adultery with a man unknown. In answer she admitted adultery with B. The intervention was allowed, and the

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case stood over for consideration whether after her deliberate perjury the discretion of the Court could be exercised to allow the second decree nisi to stand in spite of her adultery:—

Held, that in the public interest and having regard to all the circumstances of the case, the second decree nisi must be rescinded.

INTERVENTION by the King's Proctor.

The petitioner, Olive Kitty Bainbridge, obtained a decree nisi on December 21, 1917, dissolving her marriage with Thomas Bainbridge on the grounds of his adultery with one Frances Ensor and his cruelty. On November 29, 1918, on an intervention by the King's Proctor and after a hearing before Horridge J. sitting as a judge of the Divorce Division the decree nisi was rescinded and the petition was dismissed on the ground of the adultery of the petitioner with Julian Stephens, who was now dead, although the petitioner denied the charge at the hearing of the intervention.

On December 9, 1931, the petitioner, suing as a Poor Person, filed the present petition on the ground of the continued adultery of the respondent with the said Frances Ensor. The petition disclosed the intervention proceedings on the former petition and its dismissal in spite of the denial of the petitioner of the charge against her.

On May 6, 1932, the present petition came on for hearing before the Right Honourable Lord Merrivale, at that time the President of the Court. The petitioner gave evidence that she had never committed adultery with any man. She admitted that on the previous intervention she had denied adultery. She now persisted in that denial in spite of the previous finding against her. She said that she wanted to be free. On this and formal evidence of the adultery of the respondent a decree nisi was granted. There was no defence.

On December 6, 1932, the King's Proctor intervened, and by his plea alleged that the petitioner had falsely sworn at the hearing that she had never committed adultery, that she had (therefore) falsely sworn that she had never committed adultery with Julian Stephens, that she had committed adultery with Julian Stephens and with Leonard Geach, and on one occasion with a man unknown. The petitioner by her answer

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to the plea admitted that she had committed adultery with Geach but with no other man.

The intervention was heard before Lord Merrivale on May 11, 1933. Evidence of his case was given by the King's Proctor. The petitioner supported her answer in evidence and accounted for not having informed the Poor Persons Department, her counsel or her solicitors of her adultery with Geach by her "desperate anxiety to obtain a decree," as she desired to get married to a man she had known for ten years. Lord Merrivale, in giving judgment on the intervention, which he allowed, said that he had also to decide whether the case was one for the exercise of the discretion of the Court. He did not know the facts. Enough had been shown for him to decide that the intervention must be allowed, as where opportunity had been present to test the evidence of the petitioner the latter had been shown to be untrue. The hearing would be adjourned generally in order that the real facts of the case could be arrived at, which was necessary before a decision could be reached as to the exercise of the discretion.

On a summons for further directions as to the final disposal of the case its further hearing in Court was directed.

Nov. 22. The adjourned hearing came on before the Right Honourable Sir Boyd Merriman, the President.* A statement by the petitioner praying for the exercise of the discretion was produced and read to the Court. The petitioner was further called and deposed to its truth.

Theodore Turner for the King's Proctor. *Apted* v. *Apted and Bliss* (1) affords an exhaustive summary of the authorities and principles on which the Court should act in cases in which the exercise of its discretion is sought. It is there laid down as of primary importance that the Court should know the facts with reasonable certainty. *Pretty* v. *Pretty* (2) was a case in which in extreme

* Lord Merrivale had retired from the office of President of the Probate, Divorce and Admiralty Division since the previous hearing and been succeeded by Sir Boyd Merriman.

(1) [1930] P. 246.

(2) [1911] P. 83.

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circumstances the Court overlooked the perjury of a petitioner with regard to the essential facts. In *Holland* v. *Holland* (1) the Court of Appeal approved the exercise of the discretion with reference to the interests of public morality. In that case the refusal of the Court below to exercise the discretion was on the ground that mere hardship did not excuse the immorality of the petitioner. The case is a strong one, because it did not proceed on mere suppression, from the consequences of which the Court of first instance had been willing to relieve the petitioner had the suppression been the only grounds for refusing the relief, but the ground proceeded on by the Court was the public interest in general morality. *Wilson* v. *Wilson* (2) lays down categorical principles for the exercise of the discretion. It is true that in that case suppression of fact was excused, but the present case finds no place in the categories there defined.

The true conclusion of the whole matter is that even if disclosure of facts might have merited relief at an original hearing suppression then and denial of them in subsequent proceedings render discretion mischievous as an encouragement to perjury. *Stuart* v. *Stuart and Holden* (3) should be followed and the petition should be dismissed.

T. Bucknill for the petitioner. The grave charge against the petitioner is that of perjury. No doubt the case of *Roche* v. *Roche* (4) suggests that a bar results against the exercise of the discretion in favour of the petitioner. *Hunter* v. *Hunter* (5), however, in the same volume of the reports makes it the test question whether the petitioner deliberately desired to deceive the Court or was merely ashamed to tell the truth to the Court. The same learned judge who decided *Roche* v. *Roche* (4) relieved a petitioner from the consequences of perjury in *Pretty* v. *Pretty*. (6) Finally in *Brooke* v. *Brooke* (7) *Roche* v. *Roche* (4) was expressly disapproved. The conclusion is reached in *Apted* v. *Apted and Bliss* (8) that the true question is whether the Court would have exercised its discretion

(1) [1918] P. 273.
(2) [1920] P. 20.
(3) [1930] P. 77.
(4) [1905] P. 142.
(5) [1905] P. 217.
(6) [1911] P. 83.
(7) [1912] P. 136.
(8) [1930] P. 246.

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in the first instance had the facts been stated then. It is submitted that the real fact of importance in this case is that the husband had ill-treated his wife and left her and his conduct had conduced to her adultery, which would have properly called for the exercise of the discretion in her favour.

THE PRESIDENT (THE RIGHT HON. SIR BOYD MERRIMAN): This is a difficult case, for more than one reason. I am called upon to give a decision in a matter which has to all intents and purposes been fully heard by my predecessor. He had really heard the very application which is now before me. He had decided all the facts and he left only the final decision in the matter of discretion for some future occasion. I am now called upon to exercise the discretion which, in other circumstances, he himself would have exercised or refused.

The matter arises in this way. The petitioner in this case is the wife of a man who, it appears, at all material times has been and, so far as I know, at the present moment, is living in adultery with a woman named Ensor, by whom apparently he has a family. That adultery had begun at some date before 1917, because in 1917 the present petitioner presented a petition for divorce against her husband on the basis of that adultery, and obtained a decree nisi. The King's Proctor, however, intervened and alleged that she herself had been guilty of adultery with a man named Stephens, who has since died. After a trial before Horridge J. the King's Proctor's intervention was allowed on the ground that, in spite of her denial on oath, the Court was satisfied that she had committed adultery with Stephens. The decree therefore was rescinded.

So far as the parties are concerned the matter there rested until 1931, when the wife again presented a petition against her husband on the ground of the continuation of the same adultery on his part, and she indicated in that petition that she had been found guilty of the adultery with Stephens on the former occasion, and asked the Court to exercise discretion in her favour notwithstanding that finding of adultery. I used the word "finding" deliberately, for reasons that will appear in a moment. Although, so far as I know, nothing had occurred

in the matrimonial life of these parties that is material, there is one fact which had occurred in that interval of time to which I must call attention, and that is the decision in *Apted* v. *Apted and Bliss* (1), which, amongst other things, laid it down that for the future in order that there might be a full disclosure to the Court of the grounds on which discretion was prayed in any case where the party had been guilty of adultery, there should be lodged, with the petition, a statement of the admitted adultery in spite of which the exercise of discretion was prayed.

Counsel for the petitioner, who has argued this case with complete and customary candour, says that there is not the slightest question in this case but that the necessity for disclosure must have been and was plainly drawn to the attention of the petitioner; that must have been so. She was advised by experienced solicitors. She sought to sue as a Poor Person, and, as every one knows, the Poor Persons Procedure makes ample provision for calling the attention of petitioners to this matter. It is perfectly plain that when she launched her second petition in December, 1931, the vital necessity for making full and ample disclosure of the adultery in spite of which she asked the Court to exercise its discretion, was fully present in her mind. I shall make it clear in a moment that that is not merely an inference against her but is a definite fact in this particular case.

The petition having come on for hearing on May 6, 1932, before the late President, the petitioner gave evidence upon oath. She referred to the decree of December, 1917, and to the circumstances in which that decree had been rescinded. She was then asked this question by her counsel, who was examining her. The finding of adultery with Stephens was plainly brought to the attention of the Court, and counsel asked: "Quite apart from that matter have you ever committed adultery with any man?" (A.) "No." The counsel asked whether he might be permitted to ask a question with regard to Stephens and the late President permitted it, in spite of the fact that there had been a judicial finding on that matter. The

(1) [1930] P. 246.

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President having permitted the question to be put, she was referred to her previous evidence denying the adultery charged, and she said : " I still deny it." (Q.) " You were not believed, and the petition was dismissed ? " (A.) " Yes." (Q.) " Do you deny it still, or not ? " (A.) " I do still deny it." Therefore, she was telling my predecessor that not merely had she not been guilty of the adultery of which she had judicially been found guilty but she was denying positively that she had ever been guilty of adultery with any other person.

I pause here to remark, though perhaps it scarcely needs emphasis, that so far we have arrived at a point where the particular petitioner in the suit has had one petition dismissed and her decree rescinded after denying on oath that she has ever been guilty of adultery. Having had that proved against her as long ago as 1917 she has also, when bringing her present petition, had very particularly and specially called to her mind that, owing to a decision then some fourteen years old, it was more than ever necessary that any misconduct in spite of which she had to ask for the discretion should be plainly and emphatically brought to the notice of the Court.

That is her evidence in May, 1932. She has brought to the attention of the Court the fact that there was a previous finding of adultery against her. She has denied that adultery upon oath, and she has denied categorically any other adultery. Moreover the learned President believed her and acted upon that belief. He says so in the judgment on the King's Proctor's intervention ; he says this : " She also stated here in the most deliberate way that she had never been guilty of adultery either with Stephens or with any other man, and it was said that the reason for her taking proceedings was that she wanted to be free. I believed her evidence and granted a decree nisi."

Now, what are the actual facts ? Once more the King's Proctor intervened after decree nisi and, on this intervention, he made no further allegation, so far as I know, as regards Stephens—at any rate it is immaterial—but he did allege two things. He referred again to Stephens ; let me say that I have said all I wish to say with regard to the adultery so far as Stephens is concerned. I am content to leave that where the

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late President left it. It is quite impossible for me—and that is one of the reasons why I said that this is a very difficult case for me—to reopen that matter. All I can say is that there was a finding by Horridge J. that she had committed adultery. Whether in the strictest sense of the expression that is res judicata I am certainly not going now to inquire, and I have the statement of my predecessor that, in spite of that finding, he believed the petitioner's statement that she had not committed that adultery. There I must leave that, because its real bearing upon this case is no more than this, that so far as that particular issue is concerned, wherever the truth lies it is perfectly plain that the whole matter was brought before the Court. There I must leave it, and I am not going to refer again to the adultery with Stephens.

But what I am concerned with is the further allegations by the King's Proctor, who alleged that over a period of some eighteen months—I am not going to pause to give the exact dates—in 1921 and 1922, this woman had been living, cohabiting and habitually committing adultery with a man named Geach, and moreover that, in addition to that, on a subsequent occasion she had committed adultery with a man unknown in the course of some disorderly proceedings of which evidence has been given. Let me get that last allegation out of the way by saying this, that again I have not heard the evidence about it, in the strict sense of the word. I have had the transcript read. Again, in a sense, that was decided by my predecessor, and I am going to leave it, as I have left the Stephens incident, where he left it. I think I may summarize it by saying that he did not definitely decide it one way or the other, but he plainly hinted that he thought there was no smoke without a fire. The actual words which he used were these: "There is the evidence of a witness who is called here with regard to some transactions at the house in which she was living at the time to which the charge relates, which seems to indicate that her relations with men were not confined to the man named." As I say, all that has been decided, or, in this instance, left not definitely decided, before I approached the matter at all;

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and I will not say any more about that particular allegation of adultery.

But this emerges beyond the possibility of doubt: it is now admitted, and admitted formally on the record, and on oath by the petitioner, that she had committed adultery with the man Geach for the whole of the period named. The matter cannot be more plainly stated than as it was put by counsel for the King's Proctor on the intervention in some five or six questions which he directed to the petitioner, on the intervention. After saying that he did not intend to go further into the history of the Stephens matter, counsel, referring back to the evidence of which I have already read the material part, asked: "Did you intend his Lordship to believe on May 6, that you had never committed any adultery in your life at all?" (A.) "Well, I did say so, but in this case I told you how dreadfully sorry I am. I know I have been very wicked in concealing from the Court about the adultery with Geach, but I was desperately anxious to get my divorce, and that was why I said it." (Q.) "You realized on that occasion, did not you, that you were asking the Court to exercise its discretion in your favour?" (A.) "Yes." (Q.) "You were proceeding as a Poor Person?" (A.) "Yes." (Q.) "And, I suppose, they warned you that you would have to make a full disclosure?" (A.) "Yes, they did." (Q.) "And your solicitors?" (A.) "Yes." (Q.) "And, in spite of that, and in spite of your previous experience of an intervention of the King's Proctor, you decided to conceal the fact?" (A.) "Yes." (Q.) "And indeed you actually denied it upon your oath in the witness-box?" (A.) "Yes, I did." (Q.) "Did you sign a paper for the purpose of the Poor Persons Procedure?" (A.) "Yes." (Q.) "You signed a declaration?" (A.) "Yes." The matter could not have been put in a small compass more neatly than that, and, in a word, it emerges that this is a case—one must speak plainly—of deliberate concealment in the course of the then recently instituted procedure, of which she was made perfectly aware, and of deliberate perjury in the witness-box. I do not think I am using too strong a word in using the word "perjury," because

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it is perfectly plain that the witness has admitted the falsity of the oath certainly, and admitted that she knew the materiality of the facts to which she was deposing.

If I may re-state it, the position we have now got is this— I assume there was not perjury on the previous occasion because the learned President, my predecessor, believed, on the facts as they were then presented to him, with no knowledge of this other adultery, that she had not committed adultery with Stephens; but, be that as it may, this woman, who on a previous occasion has had her decree rescinded, because of a finding of adultery against her in spite of her oath to the contrary, comes again and deliberately conceals from the Court other adultery subsequently committed, and deliberately commits perjury in support of that concealment, and I am asked, nevertheless, to exercise my discretion in her favour.

It is a difficult case. I do not know, and I do not think I ought to inquire, how I myself should have acted if the mere matrimonial history had stood alone. I am prepared to assume, without in the least expressing any decided opinion one way or the other, that it is a case in which, if there had been nothing else, I might very properly have been asked to exercise my discretion. Indeed, counsel has not argued to the contrary. But I am satisfied, on the authorities, that that is not the right way to approach it. It is true that I am not entitled, or bound, to say that because there has been perjury therefore I must refuse to exercise my discretion in the petitioner's favour. There was a hint of that in the case of *Roche* v. *Roche*. (1) It was quite plainly dissented from later in the same year in the case of *Pretty* v. *Pretty* (2) and quite definitely stated not to be the law in the case of *Brooke* v. *Brooke* (3), in which Sir Samuel Evans said : " The result of the authorities appears to me to be that upon an intervention by the King's Proctor, even where material facts have been deliberately suppressed, or withheld, at the original hearing, the Court must consider all the facts then established by either the King's Proctor, or the petitioner, before deciding whether it will rescind the

(1) [1905] P. 142.
(2) [1911] P. 83.
(3) [1912] P. 136, 144.

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decree nisi, or exercise a discretion under s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), or adopt some intermediate course which would necessitate a further inquiry in order to ascertain the true facts." It was quite plainly upon that way of approach to the matter that my predecessor, after hearing all the facts, and after arriving at the conclusion at which he did arrive, allowed the intervention of the King's Proctor but suspended his decision as to the exercise or non-exercise of his discretion.

I am quite satisfied that no useful purpose would be served by any further investigation of the facts. We have had the petitioner in the box and she has verified on oath her amplified statement of her life history, every word of which I have read. That has not been cross-examined to, and I think everybody has agreed that we have now got all the material which the Court is ever likely to get with or without the assistance of the King's Proctor.

Therefore I have to make up my mind on the whole matter, bearing in mind very fully that certainly the discretion has been held to be exercisable where deception of the Court was unintentional, as in the cases of *Holland* v. *Holland* (1) and *Wilson* v. *Wilson* (2), and that it has been exercised and clearly exercised as a matter of law, in spite of deliberate deception, as in the cases of *Hampson* v. *Hampson* (3) and *Pretty* v. *Pretty*. (4) But at the end of it all, what the Court has got to do is to see where the real justice of the matter lies, and where the real public advantage lies with all the facts before it, and I am bound to say that, having heard the two very careful arguments in this matter, I have come to the conclusion that this is not a case in which I ought to exercise my discretion. I cannot see, on consideration of all the facts, that there is any overwhelming interest here of innocent parties, to take one of the tests, or any interests of the community "to warrant," to use the late President's words, "an exceptional order." I cannot see that this petitioner is in any exceptional position in relation to public morality, or in any position which is not common to all mankind who are not leading a

(1) [1918] P. 273.
(2) [1920] P. 20.
(3) [1914] P. 104.
(4) [1911] P. 83.

normally happy married life. It is very far removed, so far as the circumstances of the case are concerned, from such very extreme cases as those to which I have referred, *Hampson* v. *Hampson* (1) and *Pretty* v. *Pretty* (2), where, in both cases, a young woman who had been grievously ill-treated, would almost inevitably, in each case, as the result of the refusal of discretion in spite of admitted perjury, or at any rate, of attempted wilful deception of the Court, have been driven to a life of prostitution, from which there was a real chance of her being rescued by the exercise of the discretion. I cannot see that this case, taken in its own circumstances, has any such exceptional features as that at all. On the other hand, it is a case of most glaring deception of the Court, and really, though one case is no guide to another, it might almost have been the very case which the late President was considering when he laid down what were intended to be general considerations in *Apted* v. *Apted and Bliss.* (3) After laying down the procedure which was to be followed in future, and which has been followed in this case, he refused to exercise his discretion in that particular case, because, after detailing the conduct of the petitioner, he said that under cross-examination his excuse for the various falsehoods that he admitted was that he feared the truth might go against his case—a perfect paraphrase of the evidence which this petitioner has given to excuse her own deception of the Court. Taken all together, and giving full weight to all the circumstances which counsel has so properly urged on her behalf, I feel that, in the public interest, it is not only proper, but desirable, that I should refuse to exercise my discretion in favour of the petitioner, and I therefore rescind the decree nisi. The King's Proctor's intervention has already been allowed, and therefore I do not make any order about that. I dismiss the petition.

Solicitors for the petitioner: *Radcliffes & Hood, St. Barbe Sladen & Wing; The King's Proctor.*

(1) [1914] P. 104. (2) [1911] P. 83.
(3) [1930] P. 246.

R. M. M.

1933
Nov. 27.

In the Estate of ESTHER ELLEN HUMPHRIES.

Followed. In the Goods of KAUFMAN [1952] P. 325

Administration—Foreign domicil of deceased intestate—Grant of Administration by Court of domicil to Administratrix—Administratrix also next of kin of deceased by English law—English grant to attorneys of Administratrix as such and not as next of kin.

In following a foreign grant to the estate of a deceased person domiciled abroad, this Court will make the English grant to the person clothed by the Court of the domicil with the power of administration "no matter who he is or on what ground he has been clothed with that power."

The applicant for an English grant had been constituted administratrix by the Court of the domicil of the deceased. By a power of attorney given by the administratix to obtain a grant in this jurisdiction it appeared that by English law she was also entitled to a grant in the character of next of kin:—

Held, that her attorneys should take the grant for her as administratrix and not as next of kin.

Earl, In the Goods of (1867) L. R. 1 P. & M. 450 followed.

MOTION, for a grant of letters of administration to the attorneys of an administratrix under the law of a foreign domicil.

The deceased, Esther Ellen Humphries, died intestate on November 21, 1920, in the State of Illinois in the United States of America, which was the place of her domicil. On May 3, 1933, the Court of the domicil made a grant of administration of her estate to Edith Humphries Saxe. There were assets belonging to the estate of the deceased in this jurisdiction. By a power of attorney dated June 12, 1933, the said E. H. Saxe, after reciting that the deceased died a widow leaving four children, of whom the said E. H. Saxe was one, purported to appoint J. W. A. Earle, G. L. Wright, T. Hopwood and A. W. Butler and any two of them her lawful attorneys, to obtain letters of administration of the estate of the said deceased in this jurisdiction which devolved on her as personal representative.

On the application of the attorneys for a grant, the Registrar refused to make an order on the ground that, as E. H. Saxe appeared on the face of the power to be a lawful daughter

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ESTHER ELLEN HUMPHRIES, *In the Estate of.*

of the deceased, the practice of the Registry required that she should take the grant by her attorneys in that character according to English law and not as the person entrusted by the law of the domicil with the administration of the estate. (1)

Two of the attorneys now moved for a grant to them of letters of administration of the estate of the deceased as attorneys for the administratrix of the estate of the deceased in that character.

Clifford Mortimer in support of the motion. The practice relied on in the Registry conflicts with long established usage. It was laid down in *Earl, In the Goods of* (2) by Lord Penzance, then Sir J. P. Wilde, that the practice of the Ecclesiastical Court in such a case should be followed. The learned judge, following *Enohin* v. *Wylie* (3), laid down as the guiding principle that in all cases of a foreign domicil of the deceased this Court should follow the law of that domicil and make a grant to the person clothed by the Court of the domicil " with the power and duty of administering the estate, no matter who he is or on what ground he has been clothed with that power." In this case the principal of the attorneys derives her power from the fact that the Court of the domicil constituted her administratrix. Her attorneys therefore properly take the grant to the English assets for her in her character of administratrix without regard to any title she may have in English law as next of kin.

BATESON J. made an order in the terms of the motion.

Solicitors : *Patersons, Snow & Co. for Wilson, Wright, Earle & Co., Manchester.*

(1) Tristram and Coote, Probate Practice, ed. 17, p. 66 : " If the person entrusted or entitled to administer the estate by the law of the domicil of the deceased, is also entitled to the grant by English law, the practice is to give the applicant his English title to the grant."

(2) L. R. 1 P. & M. 450.

(3) (1862) 10 H. L. C. 1, 13.

R. M. M.

1933
Dec. 20.

In the Estate of LEGUIA.

Ex parte ASHWORTH.

Ex parte MEINERTZHAGEN.

Probate—Administration with will annexed—Foreign Executor—English assets—Insolvent estate—No citation of or renunciation by executor—Executor intending to quit jurisdiction without taking Probate—General jurisdiction to pass over executor—Grant of Administration with will annexed to English creditors of deceased—21 *Hen.* 8, *c.* 5, *s.* 3—*Court of Probate Act*, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 73—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 5, 55—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 162—*Administration of Justice Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 26), *s.* 9.

The deceased, a Peruvian, died in Peru on February 6, 1932, leaving a will of which his son was the surviving executor. The estate was insolvent and consisted in part of English assets which formed the subject of pending proceedings in Chancery. The executor had not been cited and had not renounced probate. There was evidence that the executor, who had been in this country since the death of the deceased, had taken no steps to obtain probate and had withdrawn a retainer given to English solicitors, intending to leave the country without taking probate. The Court, in the exercise of its general jurisdiction, passed over the executor and made a grant of administration with the will annexed to English creditors of the deceased.

Motions for the appointment of creditors as administrators of the estate of the deceased with his will annexed under s. 162 of the Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928.

There were originally two separate applications by separate creditors: (*a*) by G. H. Ashworth, chartered accountant, trustee of a deed of arrangement with their creditors entered into by Kearsley & Cunningham, creditors of the deceased in the sum of 317,318*l.* 9*s.* 7*d.*, the amount of an unsatisfied judgment in the King's Bench Division dated January 10, 1931, and (*b*) by Louis Ernest Meinertzhagen on behalf of Frederick Huth & Co. to the extent of 33,000*l.* or thereabouts.

These motions now came on together, and the applicants by arrangement asked for a joint grant.

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LEGUIA, *In the Estate of.*
ASHWORTH, *Ex parte.*
MEINERTZHAGEN, *Ex parte.*

The deceased, Augusto Bernardino Leguia, a Peruvian national, died at Lima, Peru, on February 6, 1932, leaving a will dated January 31, 1931, of which his son Juan Leguia and one Eleodoro Romero were executors, the latter predeceasing the deceased. The surviving executor came to England in October, 1933, but took no steps to obtain probate and had since withdrawn a retainer given to English solicitors.

The English assets consisted of a sum of 15,000*l.* due under policies of insurance which had been paid into Court and was alleged to be subject to a charge to the Russian Bank of Foreign Trade. Proceedings in Chancery to enforce this charge against the assets had been adjourned pending the constitution in this Division of a personal representative of the deceased. It was suggested that further assets existed, of extent at present unknown. The estate of the deceased was insolvent; the assets in Peru, the place of the domicil of the deceased, had been confiscated by the Peruvian Government, and the legatees under the will were residing abroad and none of them had taken any steps to obtain administration in England.

A representative of the solicitors who had acted for Juan Leguia, was called and gave evidence that as far as he knew no steps had been taken by their former client to obtain probate.

Noel Middleton for Ashworth. The Administration of Estates Act, 1925, s. 5, contains statutory conditions under which the Court can pass over an executor but does not cover the present case. There has, however, been a general power to deal with an executor who refuses to prove a will since the statute 21 Hen. 8, c. 5, s. 3, until its repeal by the Administration of Estates Act, 1925. By the interpretation section (55) of that Act, "administration" includes all letters of administration whether with or without a will annexed, and by the Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9, proviso (*b*), the Court has still power to grant administration to any person it may think expedient.

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ASHWORTH, *Ex parte.*
MEINERTZHAGEN, *Ex parte.*

Bayford K.C. (*Tyndale* with him) for Meinertzhagen. The history of the subject is illustrated by such cases as *Crawshay, In the Goods of* (1), where the Court passed over an executor in similar circumstances without citation, and *Samson, In the Goods of* (2), where the case of an absent executor is referred to. These cases were decided under the Court of Probate Act, 1857, s. 73. An example of the same class of case is to be found in *Ray, in the Goods of* (3), decided under the Judicature (Consolidation) Act, 1925, s. 162. These cases show the principle on which the Court has acted, and it has no less power under the Act of 1928. There is no willing executor; the estate is insolvent; the creditors are the only persons really interested; the Court must regard all interests, which include those of creditors.

THE PRESIDENT (SIR BOYD MERRIMAN). It is quite clear that it is desirable that a grant of letters of administration with the will annexed should be made, if possible, in the way proposed. The only question is whether, in the circumstances, I have power to order the grant to issue. The position is this. There are in this country in round figures some 15,000*l.* belonging to the estate in the shape of insurance moneys. There are creditors to an amount infinitely larger; one of them unsatisfied for over 300,000*l.* It is also stated that in Chancery proceedings now pending it is claimed that a bank has been given a charge over the insurance moneys. At all events the whole disposition of the assets in this country is being held up by reason of the fact that the sole surviving executor of the will, a son of the testator, has up to now taken no steps to prove the will. The question is whether in these circumstances it is right for me to grant administration to the creditors. It appears that the executor came to this country in October last. For aught I know he may be here still, but no steps have been taken to bring him before the Court. So far as appears he is alive but has not been cited to accept or refuse probate and has not renounced

(1) [1893] P. 108. (2) (1873) L. R. 3 P. & M. 48.
(3) (1926) 96 L. J. (P.) 37.

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it. None of the prescribed statutory conditions to divest him of his rights exist nor has he been cited to appear and show cause why he should not be held either unwilling or incompetent to take probate. Nevertheless I am satisfied that apart from statute there is a power inherent in the Court to grant administration notwithstanding the non-citation of the executor, although it is not in accordance with ordinary practice to grant it to a party with an interest inferior to that of the executor without citing him : I am unwilling in the absence of citation of the executor to assume that under no circumstances would he take probate. Chancery proceedings have been pending for some time, and the executor might have been cited by advertisement in the usual way. It is a strong course to pass over him without notice. It is, however, unnecessary to spell out all the circumstances in which the Court would feel justified in dispensing with its usual procedure when, as here, the Court has been assisted by the presence of a witness who has given evidence to the effect that the executor has taken no steps to obtain probate. Although I have expressed the doubt with which I am acting in the absence of the usual procedure I am on the whole satisfied that the general jurisdiction of the Court, as I have said, enables me to make the order asked for.

The executor has been and still may be in this country. He has deliberately refrained for nearly a year from the death of the testator from taking probate in this country. He would have derived no personal benefit had he done so. He not only deliberately refrained from doing so but withdrew his retainer from his solicitors because he intended to leave the country without taking probate.

I think that the case comes within the class of recognized exceptions to the almost invariable rule that an executor must be cited before a grant can be made to a party with an inferior interest, but I desire to emphasize the point that the facts of this case and the decision at which I have arrived upon them should not be regarded as justifying in ordinary cases any relaxation of the usual practice of giving an executor,

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by a formal notice, the opportunity of appearing before the Court.

Solicitors for Ashworth: *Field, Roscoe & Co., for Alsop, Stevens & Collins Robinson, Liverpool.*

Solicitors for Meinertzhagen: *Coward, Chance & Co.*

R. M. M.

1934
Jan. 22

EDWARDS *v.* EDWARDS, otherwise COWTAN.

Nullity suit—Decree—Maintenance of female respondent found incapable of consummation—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190.

After a decree of nullity on the ground of the incapacity of the woman to consummate the marriage, the Court on the facts made an interim order for her maintenance to be limited dum sola and reviewable within a fixed period.

MOTION to vary report of Registrar on petition for maintenance after decree of nullity of marriage on the ground of incapacity to consummate.

The ceremony of marriage was celebrated on September 15, 1923. On December 14, 1931, the man filed a petition praying for a decree of nullity on the ground of the incapacity of the woman to consummate the marriage.

There was no answer to the petition and by her answer to interrogatories the respondent admitted that there had been no consummation owing to her invincible repugnance which she alleged was due to the fact that the petitioner admitted before marriage that he was suffering from a venereal disease, but there was no suggestion that this condition continued.

A decree absolute of nullity of marriage was pronounced on the petition on July 24, 1933. On August 1, 1933, the respondent filed a petition for maintenance and alleged the

income of the man to be 180*l.* per annum and that she was without means. The report of the Registrar found that the means of the man exceeded 200*l.* per annum, that he had no capital and owed 150*l.* for costs and that the woman had no means and lived both before and since the ceremony and at the date of the report with her mother. She was 31 and the husband 34. The Registrar submitted that the petition for maintenance should be dismissed. The respondent gave notice to vary the report. There was evidence that before the ceremony the respondent had had employment earning from 1*l.* 5*s.* to 2*l.* 17*s.* 6*d.* per week.

C. Talbot-Ponsonby for the respondent. The case is one for a compassionate allowance on the merits. The Court has power under the Judicature (Consolidation) Act, 1925, s. 190, to order maintenance for the respondent in cases of nullity, *Ramsay* v. *Ramsay* otherwise *Beer*. (1)

H. W. Barnard for the petitioner. Before the Matrimonial Causes Act, 1907, which first created the present power of the Court, even a female petitioner who had obtained a decree of nullity could not obtain maintenance. Since that Act there is only one reported case of the Courts' exercise of its discretion in favour of a female respondent found to be in fault, *Gullan* v. *Gullan* otherwise *Goodwin*. (2) That case is distinguishable as both parties were found incapable of consummation. On the facts this is not a case for the exercise of the discretion of the Court.

SIR BOYD MERRIMAN (THE PRESIDENT) varied the report and made an order for the payment by the petitioner of 10*s.* per week from the date of the order, to be limited dum sola and to be reviewed in not more than two years' time.

Solicitors for the petitioner : *Mason & Co.*

Solicitors for the respondent : *Grant, Davies & Co.*

(1) (1913) 108 L. T. 382. (2) [1913] P. 160.

R. M. M.

1934

Feb. 1.

THE GASTELU.

Shipping—Collision—Altering Course in Fog—Misleading Fog Signals—Regulations for preventing Collisions at Sea, 1910, *arts.* 15 (*b*), 16.

Two steam vessels, the *H.* and the *G.*, came into collision in a fog. Both had headway at the time of the collision and were to blame for excessive speed in fog and for not stopping when they first heard the fog signals of the other vessel forward of their beam. The *G.* had been sounding a succession of two prolonged blasts (the signal prescribed by art. 15 (*b*) of the Regulations for Preventing Collisions at Sea to indicate that she was stopped in the water), when in fact she had substantial headway, and the case for the *H.*, which had meanwhile stopped her engines, was that this signal justified her in altering course and, although she still had headway, in putting her engines slow ahead again :—

Held, that before altering course in fog every precaution ought to be taken to ascertain that the vessel blowing the two blast signal, a signal which is frequently unreliable, is really stopped and not altering the bearing or getting nearer ; that from the sound of the blasts blown by the *G.* it should have been apparent that she was getting nearer and not really stopped ; that accordingly the *H.* was to blame for going on again and altering her course ; and that both vessels were to blame in equal degrees.

ACTION OF DAMAGE.

The plaintiffs were the owners of the steamship *Halesius ;* the defendants were the owners of the Spanish steamship *Gastelu.* The collision occurred in foggy weather off the coast of Portugal about 7.30 A.M. on August 7, 1933. The vessels were on nearly opposite courses : the *Halesius* being on a course of N. true and the *Gastelu* on a course of S. 5° E. true.

The plaintiffs' case, according to their preliminary act (there were no other pleadings, as the case was tried under the Short Cause Rules), was that when the *Halesius,* which was making about 10 knots, was seen to be approaching fog her whistle was kept sounding a prolonged blast at short intervals, and her engines were rung stand by and shortly afterwards eased to half speed. Shortly afterwards a long blast was heard on her starboard bow followed by the fainter long blast of a vessel which proved to be the *Gastelu* on her port bow. As the *Halesius* was getting near to the fog her engines

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were further eased to slow and shortly afterwards stopped. The *Gastelu* thereafter was heard to sound signals of two long blasts as she gradually broadened on the port bow, and, after hearing several such signals, and the whistle on the starboard bow having broadened to the beam, the *Halesius* altered course 10 degrees to starboard and put her engines to slow ahead to assist the helm. Shortly afterwards she stopped them. When the *Gastelu* came into sight, travelling at speed towards the *Halesius*, the wheel was put hard-a-port to try to throw the quarter clear, but the port anchor of the *Gastelu* struck the port side aft of the *Halesius*.

The plaintiffs alleged (inter alia) that the *Gastelu* sounded and repeated misleading signals.

According to the defendants' preliminary act the *Gastelu* was sounding prolonged blasts for fog and she was being navigated at a moderate speed having regard to the weather conditions—namely, intermittent fog of varying density. When the fog signal of the *Halesius* was heard a considerable distance away, bearing about a point on the starboard bow, the engines of the *Gastelu* were put to slow, a prolonged blast was sounded in reply, and this was repeated after about two minutes. When a further fog signal was heard on about the same bearing, but closer, the engines were stopped. When the *Gastelu* had run off her way two prolonged blasts were sounded. The *Gastelu* thereafter remained stopped and continued to sound signals of two prolonged blasts in reply to the single prolonged blasts of the *Halesius*. When the *Halesius* was made out through the fog heading across the bows of the *Gastelu* from starboard to port the engines were put full speed astern, the wheel put hard a-starboard, and three short blasts followed by one short blast were sounded and shortly afterwards repeated.

R. F. Hayward for the plaintiffs. The *Halesius* was manœuvring for a vessel holding herself out to be stationary, whereas in fact, when she began to sound the signals of two prolonged blasts, the *Gastelu* must have had several knots headway. Even if the *Halesius* ought to have stopped a few

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moments before she did she was entitled to go on again and alter her course to pass a stationary object. The collision was brought about by the headway of the *Gastelu*.

G. St. C. Pilcher for the defendants. If the *Gastelu* had the substantial headway which the plaintiffs allege those on the *Halesius* ought to have appreciated from the sound of the blasts that the *Gastelu* was approaching and was not stopped. The sound of the whistle signals, repeated several times, must have been getting louder and were really a warning to the *Halesius* not to go ahead under a starboard wheel. Altering course in fog is always a dangerous manœuvre and has been condemned in numerous cases, and it was the starboarding of the helm of the *Halesius* which brought about the collision.

BATESON J. I have come to the conclusion, in which the Elder Brother agrees with me, that both these vessels are to blame, and I find also that they are equally to blame. In my view the real cause of this accident was that these two vessels were proceeding too fast in fog, and did not get their way off as they should have done before taking the manœuvres they did.

In dealing with the case from the point of view of the Regulations I find that both ships were going too fast in fog. Neither of them stopped when they heard the whistle of the other ship in front of them ; each did something which I think in this case was wrong ; the Spanish ship blew two long blasts when she had not lost all her way, which is a very common thing. I cannot accept the excuse made by the master of the *Halesius* for altering his helm in fog, which is a very dangerous manœuvre and one which I think is generally condemned unless it turns out in the result that it could not have done any harm. If a vessel is going to alter her helm after another vessel has given her a signal of two long blasts, every precaution ought to be taken, before going ahead and using the helm, to make sure that the bearing of the blasts corresponds with what they are saying. It is only a matter of waiting a little longer when you cannot

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see what is in front of you, to make sure whether the sound is getting nearer, or whether it is altering its bearing, and if so in which direction, in order to be safe in putting the engines ahead, and using the helm. An invitation such as is conveyed by two long blasts is one which I think is well known to be seldom quite reliable. I think if proper precautions had been taken the master of the *Halesius* ought not to have gone on with his engines or used his helm. Good navigation requires one to make sure, before putting the engines ahead and altering the helm, that the other vessel is not changing her bearing or her distance. In my opinion it ought to have been clear in this case from the several long blasts that were blown that the *Gastelu* was getting nearer all the time, and therefore was not really stopped in the water. Further than that, the master of the *Halesius* put his engines on slow for some two minutes, he says, to help the helm. Even if the *Gastelu* was stopped it was quite unnecessary to increase the *Halesius*' way under those circumstances; she had as much as 3 knots way at the time of the collision according to her own account. If the *Gastelu* was stopped, the slowness of the *Halesius*' action on her helm would not matter, and on the whole I have had to come to the conclusion that she was wrong in altering her helm. The Elder Brother put it in this way: If the navigation was cautious up to the time of taking action there might possibly be some excuse for that action. The vessel should have been brought to a stand-still before taking such action as the starboarding involved. All the greater precaution was necessary, the blasts being more or less ahead, for it could not be assumed that the vessels were end on—there might be vessels coming from the north-westward making for Lisbon.

It seems to me therefore that these two vessels were negligent in different respects. It is true that the real fault was that they were going too fast in the fog initially, and I cannot see that one of them is any blacker than the other. The master of the *Halesius* seemed to me to be an honest man, but his estimates were I think too favourable for himself. He gave his evidence, I thought, quite fairly. On the other

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hand, I do not think that the master of the *Gastelu* was a bad witness. But I am going to decide in this case on what seem to me to be admitted facts.

The speeds on the ships when they were in collision I think were much about the same. They were not very fast. They had taken some steps to get their way off. The original way of the *Halesius* was 10 knots or a little more, and the Spanish ship about $8\frac{1}{2}$, but both of them delayed getting off their way, and I am satisfied that the speeds were at all material times too fast, especially in the neighbourhood of the Burlings, where there is a good deal of traffic and not all up and down the coast, as was suggested in argument.

The two vessels are much the same size. The *Gastelu* is 331 feet long by 48 feet beam ; her draught was 20 feet 1 inch forward and 19 feet 11 inches aft. The *Halesius* is 385 feet long, 51 feet beam and drawing 20 feet aft and 16 feet 7 inches forward. Both of them were loaded. The collision happened about half-past seven on August 7, 1933, in Lat. 38° 56′ N., Long. 9° 48′ W., about thirty miles W.N.W. of Lisbon. The wind was practically calm, and there was no tide. The original courses of the two vessels were, the *Halesius* N. true and the *Gastelu* about S. 5° E. true. It is noticeable, when we came to the evidence that N. 10° E. true, the course pleaded "when the other vessel was first seen" was the *Halesius*' heading at the time of the actual accident, because she had gone off that much under her helm when she had heard two long blasts from the other ship, and I think she was actually on the swing of that 10 degrees alteration at the time of the accident, because, from the engineer's log, it is clear that at the time the engines were stopped for the manœuvre of using starboard helm the collision happened. I know the time is put later in the deck log, but the engineer says that he stopped the engines and there was the collision. The altering of this 10 degrees from N. to N. 10° E. took place, or was actually taking place, at the time of the accident. I do not think the master was right when he said that the ship was coming back under a port wheel at the last, although very soon after the collision she might well have done so.

They saw each other at very close quarters—something like 200 feet I think, or probably even less. It is noticeable that in the preliminary act of the *Halesius* she makes it very clear that she did not stop her engines until after the single long blast not only of the *Gastelu* but of another ship that she had heard on the other bow.

There is the further question of whether the *Gastelu* altered her helm or heading. I see no evidence of it, unless it can be said that the angle of the blow shows that she did so. That does not satisfy me that she must have done it. The *Gastelu* says she did not alter and the people on the *Halesius* said that they only saw her for a very short time; that she came straight at them; and that they saw no alteration of her course at all. On the other hand the *Halesius* has to admit that just before the collision she had been under two minutes of slow ahead with her helm altering 10 degrees. The *Gastelu* denies altering, a denial which I accept; the other admits altering, and has to excuse herself for so doing by trying to put the blame on the other ship, which blew two prolonged blasts to indicate that she was stopped in the water when she was not. The *Halesius* was going much too fast considering that she was in a fog bank; the *Gastelu* has that fine expression "reduced speed" in her log, when, in fact, she was going her full speed up to quite a late period. When I say "a late period," she was not going at reduced speed for the long time that she endeavours to make out, but only when she got into the neighbourhood of the other ship; just before that she was going at her full speed.

For these reasons both vessels are to blame, with no differentiation as to the degree.

Solicitors for the plaintiffs: *Wm. A. Crump & Son.*
Solicitors for the defendants: *Ince, Roscoe, Wilson & Glover.*

E. C. M. T.

HUNTER *v.* HUNTER.

1934

Jan. 24.

Divorce—Decree Absolute—Delay of Petitioner in proceeding after decree nisi—Power of Court to withhold decree absolute—Matrimonial Causes Act, 1860 (23 & 24 *Vict. c.* 144), *s.* 7—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 178 (3*a*), 183.

The discretionary power of the Court to withhold a decree of divorce under the Judicature (Consolidation) Act, 1925 (s. 178 (3*a*)), on the ground of unreasonable delay in the prosecution of the petition extends to cases of delay in proceeding to decree absolute after a decree nisi has been pronounced. In such a case the Court has power to refuse a decree absolute, especially when there is reason to suppose that the delay on the part of a petitioning wife has been caused by a design to obtain enlarged maintenance.

Application for decree absolute. By direction of the President (Sir Boyd Merriman) the application was made by way of motion. There was also a cross-motion by the respondent to dismiss the petition for want of prosecution.

On April 11, 1930, the wife, the petitioner, obtained a decree nisi for the dissolution of her marriage. The material matter was the delay on the part of the wife in proceeding to decree absolute. It appeared that the delay had arisen in connection with discussions between the parties with reference to the amount of maintenance to be allotted to the wife. The direction to make application by way of motion was in order that the question of delay might be argued.

Noel Middleton for the petitioner. The practice has been to leave the respondent to apply for the dismissal of the petition for want of prosecution in the event of delay on the part of a petitioner in making the decree absolute. Delay in making a decree absolute does not call for the interference of the Court ex proprio motu. In *Lewis* v. *Lewis* (1) the Judge Ordinary (Sir C. Cresswell) expressed his doubt whether the Court had power to dismiss a petition after decree nisi except in cases of intervention by the King's Proctor or a third person.

(1) (1861) 2 Sw. & Tr. 394.

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In *Patterson* v. *Patterson & Graham* (1) Lord Penzance expressed himself satisfied that by the Statute 23 & 24 Vict. c. 144, s. 7, which divided the decree for divorce into two stages, "nisi" and "absolute," he was bound to proceed in due course to the later stage except in cases in which cause was shown against the decree as the statute prescribed, i.e., for collusion or suppression of material facts.

H. B. Durley Grazebrook (*H. Durley Grazebrook* with him) for the respondent.

THE PRESIDENT (SIR BOYD MERRIMAN): I thought that this case should be argued in open Court because I am not prepared to give the sanction of the Court as a matter of course to an application to make a decree absolute after long delay; particularly when there is reason to suppose that the delay has been caused by a design to obtain more favourable terms as to maintenance for the spouse who has obtained the decree nisi. The present case on the face of it appeared to be one of that class. The decree nisi was pronounced in 1930. There have been negotiations with regard to maintenance in the meantime and the respondent husband has applied for the dismissal of the petition for want of prosecution. The petitioning wife applied to have the decree made absolute notwithstanding the lapse of time. In these circumstances I thought that the case should be discussed in open Court. I entertain no doubt of my jurisdiction to consider whether or not the decree should be made absolute. It is in accordance with the established practice of the Court that the husband should apply for the dismissal of the petition for want of prosecution. Counsel for the wife says that in this case, as there is no question of collusion and the King's Proctor has not intervened, the Court has no option but to make the decree absolute. I should have declined to accept that proposition without hearing the King's Proctor. I am satisfied in my own mind that there is ground for the refusal of a decree absolute if there has been unreasonable delay in prosecuting the petition since the decree nisi. I must decline to accept the argument

(1) (1870) L. R. 2 P. & M. 192.

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The President.

that after decree nisi a petition becomes a petition incapable of prosecution in the ordinary sense of the word. In my view the effect of the Judicature (Consolidation) Act, 1925, ss. 178, 183, tends in the opposite direction. Having arrived at this conclusion as to the extent of the jurisdiction, I should view with great disfavour any case in which I was satisfied that there had been a deliberate holding up of the decree absolute or a deliberate failure to prosecute the petition after decree nisi for the purpose of extracting terms more favourable to the petitioner than those contemplated when the decree nisi was pronounced. I do not wish it to be supposed to be the practice in such cases that petitioners need only file perfunctory affidavits giving no real explanation of the delay.

At first sight the affidavit in the present case gave the impression that the sole cause of the delay was a design to enforce better terms of maintenance. I do not now take that view. The husband has been subjected to proceedings for maintenance. It is clear that there was a bona fide dispute as to that and a final settlement has now been reached. In those circumstances, notwithstanding the delay, I do not think that it would be right for me to refuse leave to proceed to decree absolute.

Solicitors for the petitioner : *Mills, Curry & Gaskell.*

Solicitors for the respondent : *Shepheards, Walters & Bingley.*

R. M. M.

HIGGS *v.* HIGGS.

1934

Feb. 14, 19.

Solicitor—Costs—Lien—Charging Order—Bankruptcy of client—Proof by solicitor as unsecured creditor—Fund receivable by Official Receiver in Bankruptcy on garnishee order—Priority—Property recovered or preserved —Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 7, *Sch.* II., *r.* 5—*Solicitors Act*, 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 69.

A declaration that a solicitor is entitled to a charging order for his costs under the Solicitors Act, 1932, s. 69, is discretionary on the part of the Court and should not be made if the solicitor has stood by while the fund sought to be charged has been dealt with under circumstances which render it unjust that the interest of other parties should be postponed to the lien of the solicitor.

Solicitors for a petitioning wife in a matrimonial suit obtained an order for the costs payable by the respondent husband without obtaining payment from him. The petitioner became a bankrupt and the solicitors proved in the bankruptcy as unsecured creditors of the petitioner for the amount of the costs; the solicitors subsequently applied for a charging order on the amount of a legacy bequeathed to the husband in respect of which the Official Receiver in the bankruptcy had already obtained a garnishee order:—

Held, that the discretion of the Court to make the charging order should not be exercised (*a*) because the admission of the proof of the solicitors as unsecured creditors was inconsistent with the security which the charging order would afford; (*b*) because the property involved in the legacy had not been recovered by the solicitors, being still in the hands of the trustees of the will by which it was bequeathed; and (*c*) because a charging order would create a new right of creditors in the bankruptcy, which did not exist at the date of the bankruptcy, contrary to the Bankruptcy Act, 1914, s. 7.

Adjourned Summons for a charging order.

The wife, Dorothy Maude Mary Higgs, filed a petition in 1924 for a judicial separation from the husband, Robert Joseph Higgs. The petition came on for hearing and was dismissed in February, 1927, an order being made that the wife should have her costs as taxed up to the amount ordered to be paid or secured. The respondent husband had been ordered to pay to the petitioner or her solicitors, Messrs. Mills, Lockyer, Church & Evill, 47*l.* 16*s.* 3*d.*, the amount of such taxed costs up to the setting down of the cause, and to lodge in Court or give a bond for 40*l.*, her estimated costs of the hearing. Neither part of the order was complied with, and on October 26, 1933, the order, so far as concerned the

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sum of 40*l.*, was varied by making that sum payable to the solicitors of the wife. On January 7, 1930, the wife was adjudicated a bankrupt. On January 29, 1931, she was discharged, the solicitors having, on January 18, 1930, proved in the ordinary form for the amount of the costs as unsecured creditors. The husband having become entitled in 1933 to a legacy under a will considerably exceeding the amount of the costs, a garnishee order was obtained on October 7, 1933, by the Official Receiver in the bankruptcy of the wife, as substituted for the wife, attaching the interest so acquired by the husband in the legacy and owing to him by the personal representative under the will to the extent of 87*l.* 16*s.* 3*d.* to satisfy the claim of the wife against the husband for costs. On October 19, 1933, proceedings under the garnishee order were adjourned generally with an injunction restraining the receipt of the legacy by the husband. On October 26, 1933, the present summons was issued in the Divorce Division addressed to the husband and to the Official Receiver and entitled in the matrimonial suit for an order that the solicitors for the wife should have "a charge upon the sum of 108*l.* 16*s.* 3*d.* being the amount of the property recovered or to be recovered by the Official Receiver and placed by him to the credit of Dorothy Maude Mary Higgs, who was adjudicated a bankrupt on the 7th day of January, 1930, and discharged from bankruptcy on the 29th day of January, 1931 . . . . for their costs charges and expenses of and in reference to the suit." (The charge asked for included interest upon the amount 87*l.* 16*s.* 3*d.* already ordered to be paid and the amount of certain extra costs.) The summons was adjourned into Court, the husband undertaking to lodge 150*l.* part of the legacy in the custody of the Official Receiver pending decision of the question of priority.

L. J. Acton Pile for the solicitors. A sum of money recovered for costs is "property recovered or preserved" within the meaning of the Solicitors Act, s. 69: *Dallow* v. *Garrold.* (1) That case was decided under the earlier

(1) (1884) 14 Q. B. D. 543, 546.

Solicitors Act (1860), 23 & 24 Vict. c. 127, s. 28, but the language used is the same. The money the subject of the garnishee order now in the control of the Official Receiver will in due course represent the property so recovered or preserved and be a fund available for its payment. The solicitors are accordingly entitled to a charge upon that fund and seek to have it so declared. The intention of the statute is to give the solicitor priority over all persons claiming an interest in the fund unless he has been guilty of mala fides or has stood by to the prejudice of others while the fund is being dealt with: *Dallow* v. *Garrold.* (1) Lapse of time in coming to the Court is immaterial. No other rights have intervened: *In re Born.* (2) The right to the costs accrued to the solicitor three years before the bankruptcy and is in the nature of a lien or security. Even the circumstance that taxation is not complete so far as regards the extra costs is no objection: *The Marie Gartz.* (No. 2) (3) The solicitor is entitled to come to the Court for protection against his client: *Mercer* v. *Graves* (4), cited in *Mason* v. *Mason.* (5)

W. N. Stable for the Official Receiver. The applicants have no right to a charging order. The Bankruptcy Act, 1914, s. 7 (6), prevents a creditor having any remedy against the property of a bankrupt when once a receiving order has been made. A charging order sets up a new remedy from its date. It cannot be regarded as merely the enforcement of a right already possessed. Moreover the applicants have

(1) (1884) 13 Q. B. D. 543, 545, 546.
(2) [1900] 2 Ch. 433.
(3) [1920] P. 460, 462.
(4) (1872) L. R. 7 Q. B. 499, 503.
(5) [1933] P. 199, 205.

(6) The Bankruptcy Act, 1914, s. 7: "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.

(2.) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

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already proved in the bankruptcy for the very claim which they now seek to enforce in full by the charging order. The solicitors might have asserted a possessory lien over any fund available when they recovered judgment for the costs, but in this case there was no existing lien on any actual fund at the commencement of the bankruptcy nor had the solicitors reduced into possession any fund at that date. In the fact the fund did not exist till the right to the legacy vested. The charging order is a remedy for an existing right but cannot create a new right. The applicants are seeking to enforce an alleged right against property already vested in an officer of the Court although the effect of the Bankruptcy Act, 1914, s. 7 (1), is that such a right cannot now come into being. The applicants are in a dilemma—security or no security. If they have a right it is one they have already asserted and obtained satisfaction for by their proof in the bankruptcy. They proved in the ordinary way, alleging no security. They cannot now assert a different species of right, that of a secured creditor, by claiming a charging order as upon property secured by their instrumentality.

W. Latey for the husband. The husband admits that the Official Receiver stands in the shoes of the wife with regard to the debt owed by the husband for the wife's costs. The right to recover those costs was personal to the wife. It did not pass to her solicitors: *Mason* v. *Mason*. (2)

BATESON J. [after stating the facts and summarizing the effect, so far as the case was concerned of the Bankruptcy Act, 1914, s. 7, and the Solicitors Act, 1932, s. 69]: This is the effect so far as this case is concerned of these two sections. In one of them it is laid down that the solicitor may have a charge; in the other that no creditor shall have any remedy against the property or person of the debtor. I have dealt with these two conflicting sections, if they are conflicting in this case. The question arising is whether or not I should make a charging order under the Solicitors

(1) See note (6) ante, p. 97. (2) [1933] P. 199.

Act, s. 69 (1), upon the sum to come to the respondent from the trustees of a will. It is agreed that this is a discretionary matter, but it is also said that unless there has been something in the nature of delay or other good reason the Court would not exercise its discretion by refusing an order. The words used in *Dallow* v. *Garrold* (1), which has been cited in argument, are "if a solicitor had been guilty of any breach of faith, or if he had stood by while the fund was dealt with under circumstances which would render it unjust that the interests of others should be postponed to his lien, the Court would have a discretion to refuse the order." I suppose that those words import the following: "if there are any other circumstances in which it would be unfair or unjust to do so." I do not suppose that the actual words used in *Dallow* v. *Garrold* (2) are meant to be altogether exclusive. It is however admitted that there is a discretion under the section, and I do not think that on the facts of this case I ought to exercise my discretion in favour of the solicitors.

I think that when solicitors have put in a proof for their costs, as in this case, without suggesting that they have any sort of security, or a right to any security and left matters so during the bankruptcy, it would not be right, that other creditors should be put in a worse position by payment to the solicitors in full. Apparently, if the solicitors remained ordinary creditors, they might get a dividend out of the estate, and afterwards if they chose they might say that they were entitled under the charge, and so they might get paid to some extent twice over. Although no doubt the Official Receiver would be at pains to prevent that, it is

(1) The Solicitors Act, 1932, s. 69: "Any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, or for paying, the said costs out of the said property as they think fit and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor: Provided that no order shall be made if the right to recover the costs is barred by any statute of limitations."

(2) 13 Q. B. D. 543, 545, 546.

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not impossible that something of the kind might slip through unnoticed. At any rate, after all this lapse of time while nothing has been done in addition to their having proved as ordinary creditors I do not think that I ought to exercise my discretion in their favour. So far as I have a discretion I must decline to exercise it. Moreover there is a further difficulty in the way of the applicants. I do not think that their summons is in order. They are asking for a charge on property which they in fact have not recovered. They have not got any of this property, which is in fact recovered or to be recovered by the Official Receiver. The so-called property is in the hands of the trustees of the will. It has never in any sense been recovered by the solicitors. They have no doubt a right to get costs from the husband, but until there is some fund in their hands which they can attach I do not think that such a summons will lie. Still further the summons asks for a charge upon any property to be recovered and placed to the credit of the estate of the bankrupt from whatever source it comes. As counsel for the Official Receiver contends, I think that I ought not to make a charging order where there is no existing lien on any actual fund—that is to say, fund in the hands of the solicitors that they can retain, which is something absent in this case. A charging order made now that the Official Receiver has intervened would be giving the solicitors a new right. In other words, if there is no present right at the date of the bankruptcy and a charging order could be made after the property of the bankrupt has been vested in the Official Receiver, a new right would be set up which was not possessed by the solicitors at the date of the bankruptcy. If, as creditors, they had any right before the vesting order, they could not prove, as they did, without disclosing it. Having proved in the ordinary way without disclosing it they are met by r. 5 of the Second Schedule to the Bankruptcy Act, 1914, which is this: "The affidavit shall state whether the creditor is or is not a secured creditor." The Rules in effect do not allow him to utilize his security except by order of the Court on application in the bankruptcy. That is to say

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when he makes his claim he must either show his security and rest on that, or he must rest on his claim as an ordinary creditor and give up any security he may have, and he cannot get out of that position without the leave of the Court in bankruptcy.

Having elected in this case to prove in the bankruptcy in the ordinary way the solicitors cannot come forward now and ask for security, which would be the effect of my granting them a charging order. The actual terms of their proof are that they have sworn that they have no security; if that is so and they had no security they are coming now, long after the bankruptcy, and asking me to give them a security, and I do not think that that is right. I do not think that I ought to give them any priority over the other creditors. Generally I adopt the argument of counsel for the Official Receiver. In this case I do not think *Dallow* v. *Garrold* (1) and the other cases cited on the other side apply.

For the reasons given the summons will be dismissed.

Summons dismissed with costs to the husband and the Official Receiver.

Solicitors: *Mills, Lockyer, Church & Evill; Tarry, Sherlock & King; Thorp, Saunders & Thorp.*

(1) 13 Q. B. D. 543, 545, 546.

R. M. M.

1934

March 22.

ROBERTS, W. E. (Deceased).

Will—Execution—Place of Testator's signature—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 9—*Wills Act Amendment Act*, 1852 (15 & 16 *Vict. c.* 24), *s.* 1.

Distinguished. In the Goods of HARRIS [1952] P. 319

A testator filled the whole of a sheet of paper with the dispositions of a holograph will leaving no space at the foot of the sheet for his own signature or those of attesting witnesses. These were placed on the left hand margin of the paper at right angles to the dispositions of the will, the names, descriptions and addresses of the witnesses occupying the lower and the signature of the testator the upper margin :—

Held, that the will was duly executed. *In re Stalman. Stalman* v. *Jones* (1931) 145 L. T. 339 distinguished. *In the Goods of Coombs* (1866) L. R. 1 P. & M. 302 followed.

Motion for the admission to probate of the will dated August 13, 1932, of William Edward Roberts, who died on December 6, 1933, leaving a net estate of upwards of 15,000*l*. The will was a holograph document and its execution and attestation were duly proved. The only question arising was with reference to the position on the will of the signature of the testator and whether this latter complied in the matter of its position with the requirements of the Wills Act, 1837 (1 Vict. c. 26), s. 9, and the Wills Act Amendment Act, 1852 (15 Vict. c. 24), s. 1. (1)

(1) The Wills Act Amendment Act, 1852, s. 1 (so far as material) : "Every will shall, so far only as regards the position of the signature of the testator . . . . be deemed to be valid within the said enactment, (Wills Act, 1837) as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at

The deceased wrote out his will on a sheet of lined paper. The will occupied a page leaving no space at the foot or end of it for the signature of the testator or the witnesses. These were written in the left hand margin of the paper at right angles to the operative portion of the will as here shown.

Signed at Parkstone W. E. Roberts

This is the last will and testament of William Edward Roberts, Mount Eldon, Mount Road, Parkstone

[Operative part of Will.]

Witnesses to the signature of William Edward Roberts both being present (Signatures and descriptions of witnesses)

[End of operative part.]

All parties interested in the estate consented to the admission of the will to probate.

T. Bucknill for the Motion. The position of the signature is within the protection of the Wills Act Amendment Act, 1852, s. 1. The generality of that Statute is shown by its wording, "the enumeration of the above circumstances (as to the position of the signature of the testator) shall not restrict the generality of the above enactment," i.e. the Wills Act, 1837, s. 9. It is true that probate was refused *In re Stalman*. *Stalman* v. *Jones* (1) a recent case in which the signature was out of place but there the signature was actually at the top of the will and

the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it . . . . "

(1) 145 L. T. 339.

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the statute definitely excludes a signature from giving effect to any disposition underneath or following it. In *In the Goods of Usborne* (1) the position of the signature more nearly approaches that in this case, being in the margin. In that case the will was admitted to probate. In *In the Goods of William Jones* (2), Sir J. P. Wilde admitted to probate a codicil, with a signature of the testator written down the lower part of the edge of the paper at right angles to the disposition, a very similar position to that in this case. *In the Goods of Wright*, in the same volume at page 35, is a similar case. (3) *In the Goods of Coombs* (4), a similar case decided also by Sir P. Wilde, follows both the previous cases. The learned judge in his judgment relies on the words used in the statute, holding the signature to be "so placed at or after or following or under or beside or opposite to the end of the will that it shall appear on the face of the will that the testator intended to give effect by his signature to the writing signed as his will." In *Royle* v. *Harris* (5), Sir F. Jeune distinguishes *In the Goods of Coombs* (4) in such a way as to suggest that he would have followed the authority of that case had the facts been the same.

THE PRESIDENT (SIR BOYD MERRIMAN). This is a case which has given me a good deal of anxiety, because I have to be satisfied that under the statute a particular paper may be admitted to probate whether all concerned consent to the application or not. The will was quite plainly written throughout by the testator on a ruled sheet of foolscap intended to be used for recording cash transactions. There was a margin on the left hand side of about one inch in width. The sheet of paper consisted of the usual four sides, only one of which was occupied with the writing. The will begins immediately below the first line at the top and continues below the last line and there is no room for the signatures or the attestation clause at the end. The testator could have come within the section had he chosen to turn over the page and put the attestation clause and sign there in compliance with the statute. He has

(1) (1909) 25 Times L. R. 519.
(2) (1865) 4 Sw. & Tr. 1.
(3) Ibid., p. 35.
(4) L. R. 1 P. & M. 302.
(5) [1895] P. 163, 166.

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elected to sign within the inch margin but it is important to note that he has done so in such a way that the words of the attestation clause and the signatures are at right angles to and not parallel to the writing in the will. In his own handwriting he wrote the following words by way of an attestation clause. "Witnesses to the signature of William Edward Roberts, both being present" and underneath appear the signatures and addresses of the two witnesses. The words "Witnesses to the signature" are at the left at the bottom end of the margin. The words "Signed at Parkstone" with the date and the signature of the testator appear on the right of the attestation clause, i.e. at the top of the margin, accordingly as you look at the paper. The question is whether it is permissible to give effect to what I am quite satisfied was the intention of the testator, namely to sign the paper as his will, notwithstanding the fact that it is not possible to say that the signature itself is as near the side of the end of the will and as nearly opposite the end of the will as it could have been and that physically, it is nearer the beginning of the will, if you do not take into account the fact that it is written at right angles to it. I have seen the original wills in both the cases of *In the Goods of Usborne* (1) and *In re Stalman.* (2) In the latter there was, similarly, a holograph will on a sheet of paper the whole of which was occupied by the dispositive part of the will. The testatrix signed it at the top and the Court of Appeal decided that it was impossible to hold that the will complied with the section because there were words in the statute which directly ruled it out, namely—"but no signature" . . . . "shall be operative to give effect to any disposition or direction which is underneath or which follows it." That case does not hurt the present submission at all but tends to assist it. In the case of *Usborne* (1) there was a pencilled will on a half sheet of note paper the whole of which was apparently admitted to probate. The operative words covered the whole of the page. The testator made his mark, a cross, which is a little below half way down the margin. Below the cross is written "R. B. Usborne, his mark" and it

(1) 25 Times L. R. 519. (2) 145 L. T. 339.

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is all written parallel to the words of the will. It is submitted that it makes a difference when you are considering the position of the signature whether it is written at right angles or parallel to the words in the will itself. In the present case the only remaining space on this page, namely the margin, has been used in the only possible way in which it could be used, showing in the only possible way that the testator signing in the margin, in that way, intended to give effect to the whole by his signature. There would be no doubt about it if he had signed at the left hand (at the bottom of the margin) side and the witnesses had signed at the right of his signature. The case of *In the Goods of Coombs* (3) justifies me in saying that the signature and the attestation clause comply with the words of the statute. In that case the words were on the first and third sides of a double sheet of foolscap paper. The second side had been left blank except that crosswise, as in this case, along the middle of the sheet were written the signature and the attestation clause. No one could suppose that it was written opposite or beside the end of the will except in the sense that the space reserved and not used, as it could have been used if the writing of the operative part of the will had been continued in it, was used for the signature and attestation clause. I think that in principle that case is the same as this. Lord Penzance gave effect to the signature and I cannot see any difference in principle here. So far as the position of the attestation clause is concerned it could not have been at any point which was more nearly opposite or beside the end of the will; and having regard to the fact that the whole writing is at right angles to the operative part of the will I think that I am justified in holding that the signature was so placed beside or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will.

The document will, therefore, be admitted to probate.

Solicitors: *Woodcock, Ryland & Parker, for Preston & Redman, Bournemouth.*

(3) L. R. 1 P. & M. 302.

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Feb. 19, 26, 27.

Divorce—Practice—Service out of the jurisdiction—Ancillary proceedings in Matrimonial Causes—Petition for variation of settlements—Leave for service out of the jurisdiction—Order ineffective against party served—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 42—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192—*Rules of Supreme Court, Order* XI., *rr.* 1, 1 (*g*), 8, 8A (*b*), 11, 12; *Order* XII., *r.* 30—*Matrimonial Causes Rules*, 1924, *rr.* 10, 29A, *proviso* (*a*).

The intention of r. 29A of the Matrimonial Causes Rules, 1924, is to extend to ancillary proceedings in matrimonial causes the power to serve them abroad without leave, which in the case of principal petitions for dissolution of marriage has existed since the passing of the Matrimonial Causes Act, 1857, s. 42. A petition to vary a marriage settlement is such an ancillary proceeding, and R. S. C., Order XI., r. 8A (*b*), which covers it and is imported by Matrimonial Causes Rule 29A, is merely machinery for giving effect to r. 29A. R. S. C., Order XI., r. 1, does not apply, and there is no such limitation on service of divorce proceedings abroad without leave as is imposed by R. S. C., Order XI., in the case of writs of summons.

The Court has power to set aside service abroad, if it is impossible to make an effective order on the person served.

A petition to vary a settlement was served without leave in New York on American trustees of the settlement. There was expert evidence that no action could be maintained in New York on a foreign judgment against a defendant who had not been personally served within the jurisdiction of the foreign Court pronouncing the judgment and that the same consequence would attach even if leave had been given by the foreign Court for service out of its jurisdiction:—

Held, that although the service was good under the rules of the English Court if effected abroad without leave, it should nevertheless be set aside on the general ground that no effective order could result against the party served.

THE wife, the petitioner, having obtained a decree absolute for dissolution of marriage, filed a petition for variation of a marriage settlement dated July 3, 1928. The settlement was made between the respondent husband as settlor and the National City Bank of New York as trustee. Material matters were that the present trustees were the City Bank Farmers Trust Company of New York in the United States of America, that the trust investments were domiciled or dealt in at New York, and that the trustees were an American company domiciled in New York and without any office or place of

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business in Great Britain. By the settlement itself also it was provided that the income of the trust fund should be applied for the benefit of the settlor for life, that the trust should be deemed to be a New York Trust and should be governed by the laws of the State of New York, and further that the settlor should have power to modify or alter the settlement in whole or in part provided that the duties of the trustees should not be increased without their consent. The settlement was executed in New York. The petition to vary the settlement was served in New York upon the trustees, the City Bank Farmers Trust Company, on January 5, 1934. No leave had been obtained to serve it out of the jurisdiction. The trustees now moved to set aside this service on them as being a foreign corporation on the grounds (*a*) that the service was defective, and (*b*) that the English Court could not make any effective order against the trustees.

An affidavit of L. F. Crane, a solicitor in England and a member of the New York bar, stated that it was well recognized as law in the State of New York that an action could not be maintained there upon a foreign judgment or order unless the persons against whom it was sought to enforce the judgment had been personally served within the jurisdiction of the foreign Court, and accordingly the service in the present case in New York would not entitle the petitioner to maintain an action in the New York Courts upon any judgment of this Court, and further that the consequences would be the same even if leave had been obtained from this Court to effect service out of the jurisdiction.

The respondent husband was now domiciled in England.

Fergus Morton K.C. (*G. C. Tyndale* with him) for the trustees. The trustees are not necessary parties ; no effective order can be made against them and they were not properly served. There is no useful purpose in bringing them before the Court. The Court cannot effectively extinguish an interest in foreign assets. The matter can only be dealt with by New York law, and it is a useless expense to have the

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trustees here. *Tallack* v. *Tallack and Broekema* (1) should be followed. The Court will not make an order which can only be executed by invoking another jurisdiction. The only other authorities on the point are *Nunneley* v. *Nunneley and Marrian* (2) and *Forsyth* v. *Forsyth*. (3) In so far as they conflict with the more recent case of *Tallack* v. *Tallack and Broekema* (1) they are distinguishable. *Tallack* v. *Tallack and Broekema* (1) virtually decides that the Matrimonial Causes Act, 1857, s. 42, permitting service out of the jurisdiction without leave applies only to petitions for dissolution of marriage. Even if service out of the jurisdiction without leave of a petition to vary settlements were regular, the trustees could apply under R. S. C., Order XII., r. 30, to set aside the service as useless. The service, however, is irregular. Rule 29A of the Matrimonial Causes Rules, 1924, fails to reach a petition for variation of a settlement served as this was out of the jurisdiction without leave. The rule incorporates R. S. C., Order XI., rr. 8, 8A, 11 and 12. That Order is a complete code on service out of the jurisdiction, and limits the power of the Court to give leave for that service, by preventing service on unnecessary parties. A petition to vary settlements cannot come under r. 8A (*b*) of the Order, because such a petition is merely ancillary to the principal petition for dissolution and does not originate proceedings. Even if it did originate proceedings leave would still be necessary. If R. S. C., Order XI., r. 1 (*g*), is impliedly incorporated, it is still a condition that the party served out of the jurisdiction should be a necessary party to an action properly brought against a party duly served within the jurisdiction, and that condition is not satisfied, as the trustees are not necessary parties to these proceedings and leave would be necessary. There is no other provision in the incorporated Order justifying the service or suggesting that leave is unnecessary.

W. T. Monckton K.C. (*Bush James* with him) for the petitioner. There can be no challenge to any order made against the respondent. The respondent, at all events, is now amenable to

(1) [1927] P. 211, 220. (2) (1890) 15 P. D. 186.
(3) [1891] P. 363.

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this jurisdiction, and *Nunneley* v. *Nunneley and Marrian* (1) and *Forsyth* v. *Forsyth* (2) are sufficient authorities for proceedings against him. The jurisdiction in personam remains whatever considerations may apply to the property. As to the trustees they should have an opportunity of being before the Court to state their case in reference to the settlement. The petitioner will eventually ask for an order extinguishing the life interest of the respondent in the settled property and his right to revoke the settlement, and there is no real evidence of the ineffectivity of such an order in New York, and the trustees might then be necessary parties. There is full discretion to vary the settlement even if made according to foreign law: *Forsyth* v. *Forsyth* (2), *Nunneley* v. *Nunneley and Marrian* (1); and nothing to show that the New York Court would not in such an event follow this Court by comity: Dicey, ed. 5, p. 426. We rely upon the express statement in the Matrimonial Causes Rule 29A, proviso (*a*). R. S. C., Order XI., r. 8A, applies in form to Chancery proceedings, and its rules are merely incorporated to provide machinery for the Matrimonial Causes Rule.

W. N. Stable for the respondent.

Fergus Morton K.C. in reply. An ancillary petition cannot be served out of the jurisdiction without leave under Matrimonial Causes Rule 10, and therefore Rule 29A does not cure the defective service in this case. All that is necessary in this case can be secured by an order in personam on the respondent. An order on the trustees, as in *Nunneley* v. *Nunneley and Marrian* (1) and *Forsyth* v. *Forsyth*, (2) is useless and superfluous.

THE PRESIDENT (SIR BOYD MERRIMAN). This is a petition to vary settlements filed by a wife after decree absolute. One of the settlements is dated July 3, 1928. It is unnecessary to say more than this, that by the first article of the settlement the trustees are directed to apply the income of the trust fund to the settlor for his life; by article 5 the settlement is to be deemed a New York trust and in all respects to be governed by the law of New York State; and by article 6 the

(1) 15 P. D. 186. (2) [1891] P. 363.

settlor (the respondent) is enabled to modify, alter, or revoke the settlement in whole or in part, provided that the duties and liabilities of the trustees shall not be substantially increased without their written consent.

The present trustees, under a modification made by the settlor in 1929, are the City Bank Farmers Trust Company of New York. Following the usual practice of this Court the wife has served the trustees as parties with her petition to vary, and this motion arises at the instance of the American trustees, who move to set aside the service of the petition on them. In moving at this stage they have invoked R. S. C., Order XII., r. 30, instead of entering a conditional appearance and arguing the matter at a later stage. It is clear from the decisions in *Nunneley* v. *Nunneley and Marrian* (1) and *Forsyth* v. *Forsyth* (2) that this Court has power to vary a settlement inter partes even though it comprises property out of the jurisdiction and the trusts are administered by trustees out of the jurisdiction and the settlement is governed by foreign law.

In this case counsel for the trustees has submitted that (1.) the trustees ought not to be served in the present state of the trust since, apart altogether from any provision in practice rules, no effective order of any kind can be made against them in this Court. He relies on *Tallack* v. *Tallack and Broekema.* (3) It is quite plain from that case that this Court would decline to make an order to be executed in another jurisdiction when it was obvious that the order would be ineffectual. That was his main submission. He also submitted (2.) that on the rules themselves the service on the trustees was out of order. He pointed out that the case of *Tallack* v. *Tallack and Broekema* (3) decides that under the Matrimonial Causes Act, 1857, s. 42 (which corresponds though not in the exact words with r. 10 of the Matrimonial Causes Rules, 1924), a " petition " means a petition for dissolution of marriage and not an ancillary petition like the present, and he says that r. 29A introduced into the Matrimonial Causes Rules in 1932, whatever its

(1) 15 P. D. 186. (2) [1891] P. 363.

(3) [1927] P. 211, 220.

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intention, has in effect failed to reach a petition to vary settlements. Counsel says that the order expressly incorporated R. S. C., Order XI., r. 8A. He says that a petition to vary settlements could not possibly come under r. 8A (*b*) of the Order because it does not originate any proceedings. He further says that if 8A (*b*) does apply leave is still necessary. He also submits that r. 1 of R. S. C., Order XI., is incorporated by implication, that the material proviso under the rule is proviso (*g*)—namely, that a person out of the jurisdiction is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction and that the necessary conditions are not satisfied, as the trustees are not necessary or proper parties. Alternatively, he says, the Court should have regard to the same limitations as are expressed in r. 8A of the Order. That is another way of putting his main submission, or another way of stating that the Court has an inherent power to prevent abuse of its process by preventing service on unnecessary parties. Finally, Counsel submitted that proviso (*a*) to Matrimonial Causes Rule 29A does not operate to permit service abroad without leave of the Court ; and that if the document is not one the service of which can be effected without leave under Matrimonial Causes Rule 10, Rule 29A does not apply to cure the absence of leave.

Rule 29A in my opinion was adopted in order to enable documents in divorce and matrimonial causes to be served abroad without leave, or in other words put the rest of the papers in divorce cases in the position in which the principal petition itself had been ever since the Act of 1857 came into operation, whether under the statute or subsequent rules. Service of the principal petition abroad without leave has been correct ever since r. 10 of the Matrimonial Causes Rules, 1924, or rather the equivalent section which it superseded. Rule 29A is the substantive authority for this power, and the imported rules 8 and 8A in R. S. C., Order XI., are merely the machinery for giving effect to this authority. In my opinion a petition to vary settlements is a petition within R. S. C., Order XI., r. 8A (*b*), and I do not think r. 1 of Order XI. applies at all. I think that its exclusion by Matrimonial Causes Rule 29A

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was deliberate. Rule 29A makes no reference to it. Rule 29A is the operative rule here ; it is only method and machinery which are made available by reference to the specified rules of Order XI., and there is no such limitation on the service of divorce papers as is imposed on service of writs of summons dealt with in Order XI.

Thus the argument fails so far as it is based on the consideration of the Rules of the Supreme Court and the Matrimonial Causes Rules. I agree, however, with the fundamental consideration that the Court ought not to allow the service to stand if it is impossible to make an effective order on the person concerned. Counsel for the petitioner, on the other hand, says that there is no such impossibility, or if there is, then on the authority of *Nunneley* v. *Nunneley* (1) and *Forsyth* v. *Forsyth* (2) notwithstanding the objections of the trustees I ought to allow this service to stand and to let the petition proceed on the footing that they have been rightly served. I do not think that is so. In *Forsyth* v. *Forsyth* (2), as is expressly stated, the trustees appeared and took part in the variation proceedings. In *Nunneley* v. *Nunneley* (1) there is nothing to show that there may not have been English property, and it appears from the report that the trustees were resisting the making of an English order by an English Court which might conflict with an order which might be made in the Scottish Court in proceedings either pending or threatened, though they did not in terms object to the jurisdiction.

In this case there is an affidavit by a well-known authority on American law, whose opinions are always received with respect, in which he says : " It is a well recognized principle of law in the State of New York that an action cannot be successfully maintained in the New York Courts upon a foreign judgment or order unless the defendant or the person against whom the order is ordered to be enforced has been personally served within the jurisdiction of the foreign Court " (that means the Court foreign to New York State). Accordingly the affidavit goes on : " attempted service of process as has

(1) 15 P. D. 186. (2) [1891] P. 363.

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taken place here does not constitute such service as would entitle the Petitioner to maintain an action upon any judgment or order of the English Court in the Courts of New York State. The position would be the same," the opinion concludes, " even if leave had been given by the English Court."

In other words this service made in New York would in itself render the judgment of this Court one which no Court in New York would enforce. The trust on the face of it is to be governed by the law of New York, so that any order made by this Court against the New York trustees would be futile. The substance of the matter is that the New York Court might impose on them an entirely different order.

That does not seem to me to be the end of the matter. By the terms of this very unusual settlement the property, by the husband's own action, can be put within the effective reach of the Court. I am referring to the very wide terms of article 6 of the settlement. Ultimately what matters in these proceedings to vary is not whether in certain circumstances it may be impossible to make an effective order against the trustees, but whether it is possible to make an effective order against the spouse. It may be possible to make an effective order against the husband. It seems to me that in the very unusual circumstances of this particular settlement the Court would require to be satisfied that any action which the husband might be willing or be compelled to take could under article 6 be made effective in New York State law. That aspect of the matter is not one about which I ought to express any opinion at the moment.

The result is that this service on the trustees must be set aside, without prejudice to the petitioner's rights to apply for leave to dispense with service on the trustees, who will have their costs from the petitioner.

Solicitors for the trustees : *Coward, Chance & Co.*
Solicitors for the petitioner : *Withers & Co.*
Solicitors for the respondent : *B. A. Woolf & Co.*

R. M. M.

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Matrimonial Causes Rules, 1924.

"Rule 29A. The provisions of Order XI. rr. 8, 8A, 11 and 12 of the Rules of the Supreme Court (which relate to the service of documents in certain foreign countries) shall apply so as to enable documents in Divorce and Matrimonial causes to be served in accordance with those provisions;

Provided that:—

(*a*) The document may be served out of the jurisdiction without leave: . . . . "

R. S. C., O. XI., 8A (*b*).

"8A. Service out of the Jurisdiction may be allowed by the Court or a Judge of the following processes or of notice thereof, that is to say:—

(*b*) Any Originating Summons, Petition, Notice of Motion or other originating proceeding . . . .

(3.) Under any Rule of Court or Practice whereunder proceedings can be commenced otherwise than by Writ of Summons."

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Shipping—Taxation of Costs—Costs "unnecessary" for attainment of justice —Disallowance of Costs—Costs of other parties occasioned by unnecessary matter—R. S. C., Order LXV., *r.* 27, *sub-rr.* 20 *and* 29.

The plaintiffs' dredger *L.* was sunk by the defendants' vessel and the defendants admitted liability subject to a reference to assess the damages. The plaintiffs had bought the *L.* at a cost of 4000*l.* to enable them to carry out some excavation work under a contract with the Patras Harbour Commissioners, and spent another 2000*l.* in bringing her to Patras. The plaintiffs had exhausted their financial resources, the loss of the *L.* stopped the work, and accordingly they hired another and more expensive dredger, the *A.*, to take the place of the *L.* Their claim for damages, amounting to over 23,500*l.*, was made up under five heads: (i.) the actual value to them of the *L.*; (ii.) expenses incurred while the work was stopped; (iii.) hiring expenses of the *A.*; (iv.) extra cost of working the *A.*; (v.) loss of profit.

Subject to certain deductions on some of the heads of damage, the late Mr. Registrar Roscoe assessed the damages, as framed, at 19,820*l.*, together with the costs of proving the claim, and his report was confirmed by Langton J. (1)

On appeal, the Court of Appeal (2), and subsequently the House of Lords (3), held that the claim had been assessed on a wrong basis, and that all that the plaintiffs were entitled to was a capital sum representing the value of the *L.* as a going concern together with interest; and the House of Lords sent the case back to the registrar

(1) [1931] P. 230. (2) [1932] P. 52.
(3) [1933] A. C. 449.

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to assess the damages on these principles. There having been no tender, under the order of the Court of Appeal the plaintiffs were given "the costs of the reference." Mr. Registrar Darby found that the sum due was 11,333*l.*, with interest and the cost of proving the claim.

The plaintiffs then carried in for taxation the costs of the original reference including therein the whole cost of proving the claim in its original form. The assistant registrar held that the plaintiffs could only recover the costs of proving a claim on the basis laid down by the House of Lords, and accordingly he taxed off some two-thirds of the plaintiffs' bill and this taxation was upheld on appeal by Langton J.

Thereupon the defendants delivered to the plaintiffs a bill of costs for the expenses they had incurred in opposing the claim presented on a wrong basis. These costs they claimed to be entitled to under Order LXV., r. 27, sub-r. 20.

This sub-rule provides that a Court or a judge may direct that the costs of any improper, vexatious or unnecessary matter be disallowed, or may direct the taxing master to disallow them, or, if no such direction has been given, that the taxing master shall himself deal with the matter, and in either case "the party whose costs have been so disallowed shall pay the costs occasioned thereby to the other party."

By sub-r. 29: "the Taxing Master shall allow all such costs . . . . as shall appear to him to have been necessary or proper for the attainment of justice," but no costs shall be allowed which appear to have been incurred or increased "through over caution, negligence or mistake or . . . . by other unusual expenses."

The assistant registrar held that he had power to entertain and tax the defendants' bill of costs inasmuch as the plaintiffs' costs had been disallowed by him, acting under sub-r. 29, as they were not necessary or proper for the attainment of justice, and that sub-r. 20 provided that the party incurring such costs should pay the costs occasioned thereby to the other party. The plaintiffs took out a summons to review the taxation of this bill of the defendants. Langton J. allowed the objection, and the defendants appealed:—

Held, that sub-r. 20 was aimed at the piling up of costs, the costs of matters which were improper and unreasonable as well as merely unnecessary, and dealt with quite separate matters from those dealt with under the general direction in sub-r. 29; and that the assistant registrar, having disallowed the plaintiffs' costs under sub-r. 29, was not justified in then proceeding to deal with the matter under sub-r. 20 under which he had exercised no discretion.

Decision of Langton J. upheld.

Semble (per Scrutton L.J.): A taxing officer ought not to order a party to pay the costs occasioned to the other side by reason of matters in respect of which costs have been disallowed under sub-r. 29 unless there is an order of the Court to that effect.

APPEAL by the defendants from a decision of Langton J. reviewing the taxation by the assistant registrar of the defendants' costs under Order LXV., r. 27, sub-r. 20, and allowing the plaintiffs' objections to the taxation.

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On November 26, 1928, the defendants' steamship *Edison* came into collision with the plaintiffs' dredger *Liesbosch* in Patras Harbour, Greece, and the dredger became a total loss. The defendants admitted liability subject to a reference to the registrar to assess the damages.

At the time of the casualty the plaintiffs were under contract with the Patras Harbour Commissioners to carry out certain work in the harbour for which a dredger was necessary, and they had bought the *Liesbosch* for 4000*l.* and spent a further 2000*l.* in bringing her to Patras. Delay in completion of the work involved payment of penalties and, if prolonged, cancellation of the contract. The loss of the *Liesbosch* stopped the work, and the plaintiffs, being unable from want of funds to purchase another suitable dredger, on May 4, 1929, hired at a high rate the dredger *Adria* to take the place of the *Liesbosch*. The *Adria* was more expensive in working than the *Liesbosch* and required the attendance of a tug and barges. She got to work on June 17, 1929, and the Harbour Commissioners subsequently bought her for 9177*l.* and resold her to the plaintiffs for the same sum payable in instalments.

The plaintiffs presented their claim under five heads: (i.) the actual value to them of the lost *Liesbosch*, together with certain expenses attendant upon the purchase of the *Adria;* (ii.) expenses incurred from November 26, 1928, to June 16, 1929, the period during which the plaintiffs were unable to carry on any of the work of dredging but were obliged to keep some of their staff and plant; (iii.) the hiring expenses of the *Adria* from May, 1929, to June, 1930; (iv.) extra cost of operating the *Adria* as compared with the *Liesbosch;* and (v.) loss of profit owing to cessation of work under the contract. The total of the plaintiffs' claim amounted to 23,514*l.*

The registrar—the late Mr. Registrar Roscoe—allowed part (i.) in full. With certain reductions he also allowed the larger portions of parts (ii.), (iii.) and (iv.), and about one-third of the amount claimed under part (v.), the total amount of damages allowed being 19,820*l.*, together with the costs of proving the claim.

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The defendants by motion objected to the report of the registrar, and Langton J. (1) confirmed the report (subject to a small reduction of 30*l.*), affirming the principle upon which the registrar had proceeded in assessing the damages—namely, that the plaintiffs were bound to minimize the damages flowing from the loss of the dredger, and were entitled to take all reasonable steps to carry out their contract with as little delay as possible, having regard to all the existing circumstances.

The defendants appealed, and the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) (2) reversed the order of Langton J. and held that the plaintiffs could recover no more than the value of the *Liesbosch* as a going concern at the time and place of her loss (which the Court estimated in round figures at 9000*l.*) with interest thereon; and that any loss which the plaintiffs sustained through being hindered in the performance of their contract with the Harbour Commissioners was not the direct and natural consequences of the collision and must be excluded. Scrutton L.J. said: "As to costs, the defendants made no tender or payment into Court and must pay the costs of the reference. . . . . The defendants must have the costs of this appeal, and of the appeal to Langton J."

The plaintiffs appealed to the House of Lords, which held (3) that the measure of damages was the value of the *Liesbosch* to her owners as a profit-earning dredger at the time and place of her loss; and that it should include (i.) a capital sum made up of (*a*) the market price on November 26, 1928, of a dredger comparable to the *Liesbosch*; (*b*) the cost of adapting the new dredger and of transporting and insuring her from her moorings to Patras; and (*c*) compensation for disturbance and loss suffered by the owners of the *Liesbosch* in carrying out their contract between November 26, 1928, and the date on which the substituted dredger could reasonably have been available for use at Patras; (ii.) interest upon that capital sum from November 26, 1928. The order of the Court of Appeal to be varied by substituting for the judgment for 9177*l.* a judgment

(1) [1931] P. 230. (2) [1932] P. 52, 68.
(3) [1933] A. C. 449.

for such sum as the Admiralty Registrar might find on reference back to him; subject to such variation, the order of the Court of Appeal was to stand. The appellants (plaintiffs) were ordered to pay to the respondents (defendants) three-quarters of their costs of the appeal.

The registrar—Mr. Registrar Darby—assessed the damages sustained by the plaintiffs—which had been reformulated in the sum of 13,326*l.*—upon the principles laid down by the House of Lords, and found there was due to the plaintiffs in respect of their claim the sum of 11,333*l.* with interest and the costs of proving their claim.

The plaintiffs carried in for taxation the costs of the original reference and included therein the whole of the costs of proving their claim as originally formulated, the amount of the bill being over 1900*l.* The assistant registrar held that the plaintiffs could only recover the costs of proving a claim on the basis laid down by the House of Lords, and he accordingly taxed the plaintiffs' bill of costs of the first reference down to 654*l.*

The plaintiffs carried in objections to the disallowance of their costs, contending that they were entitled to recover their proper costs of proving the claim as rendered to the registrar and accepted by him.

The assistant registrar in his answers to the plaintiffs' objections said: "The orders upon which the plaintiffs rely were (1.) that of the registrar [Mr. Registrar Roscoe] who gave them the costs 'of proving their claim,' and (2.) that of the Court of Appeal which, as is usual in cases where there has been no tender, gave them the 'costs of reference.' In my opinion the objection wrongly assumes that the costs to which the plaintiffs are entitled under these orders are not subject to taxation. Had the registrar in the first instance disallowed those items which were subsequently disallowed by the Court of Appeal and the House of Lords his order would have been the same, viz., 'costs of proving the claim' and it would have been for me as taxing officer to differentiate between such costs as were incurred in proving items which were allowed and those in support of items which were wholly

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disallowed. . . . . It is true that there was no order dealing specifically with certain issues, but such an order is only necessary where the intention is to give the opposite party the costs of those issues. In the absence of any such order it is still open to the taxing officer to disallow the cost incurred in putting forward any items of a claim which have been disallowed."

The matters came before Langton J. on objections to taxation, and he held that the taxing officer had exercised his discretion properly and disallowed the objections.

The defendants then delivered to the plaintiffs a bill of costs (the subject of the present appeal) for the expenses they had incurred in opposing the claim on a wrong basis which the plaintiffs had originally put forward, and which the defendants said they were entitled to recover by reason of the provisions of Order LXV., r. 27, sub-r. 20. (1) This bill was carried in for taxation, the assistant registrar held that the defendants were entitled to recover those costs, and he proceeded to tax the bill.

(1) R. S. C., Order LXV., r. 27, sub-r. 20: "The Court or Judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at chambers, and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit, or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so: and in the King's Bench Division the Master shall make such order as may be required to effect the object of this regulation."

Sub-r. 29: "On every taxation the Taxing Master shall allow all such

The plaintiffs carried in objections to the taxation and allowance of the defendants' costs under Order LXV., r. 27, sub-r. 20, on the ground that the assistant registrar had applied wrongly the principle laid down in that sub-rule. They contended that as there had been no disallowance of their costs under sub-r. 20 there was no power in the taxing officer to entertain and tax the defendants' bill.

The assistant registrar's answers to the plaintiffs' objections were as follows: "The plaintiffs' costs were disallowed by me as they were incurred in order to support their claim to certain items of damage to which it was eventually held they were not entitled. In so doing I was acting under Order LXV., r. 27, sub-r. 29, as in my opinion these costs were not necessary or proper for the attainment of justice. The plaintiffs' appeal from this taxation was dismissed with costs. The defendants then lodged the bill to which the present objection relates under Order LXV., r. 27, sub-r. 20. . . . ."

"The plaintiffs' costs were disallowed as being 'unnecessary and/or improper' for the attainment of justice; reg. 20 provides that the party incurring such costs shall pay the costs occasioned thereby to the other parties (i.e. the defendants) and that the taxing officer shall tax the other party's bill without an order. *Garrard* v. *Edge* (1) is a case where this procedure was acted upon."

The plaintiffs took out a summons to review the taxation by the assistant registrar, and Langton J. allowed the plaintiffs' objection to the taxation, holding that the rule in question was never intended to apply to such a case as the present.

The defendants appealed.

R. F. Hayward for the appellants. The bill of costs which

costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

(1) (1890) 44 Ch. D. 224.

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the defendants brought in was in respect of costs which they were obliged to incur by reason of the improper and unnecessary matter in the plaintiffs' claim in the first instance. These costs the defendants are entitled to by reason of Order LXV., r. 27, sub-r. 20. That rule means that in any case whether or not there is an order of a Court or judge to that effect the taxing officer must look into the question to see whether improper, vexatious or unnecessary matter has been introduced, and, if so, to disallow the costs thereof, in which case the party whose costs are disallowed must pay the costs occasioned thereby to the other party. The terms of the rule are clear. The plaintiffs in their objection to the defendants' bill did not object that the defendants' costs were not incurred by reason of the introduction by the plaintiffs of improper or unnecessary matter ; the plaintiffs objected to the whole bill on the ground that as there had been no disallowance of their costs under Order LXV., r. 27, sub-r. 20, the taxing officer had no jurisdiction to tax the defendants' bill. It is a fundamental principle in dealing with appeals arising upon a taxation of costs that the appellant is strictly tied to the objections made by him to the taxing master and answered by the latter—per Fletcher Moulton L.J. in *Mentors, Ld.* v. *Evans.* (1) See also *Shrapnel* v. *Laing* (2) and *Société Anonyme Pêcheries Ostendaises* v. *Merchants' Marine Insurance Co.* (3)

[GREER L.J. If your contention is right it would never be necessary for a defendant who has succeeded to ask for costs.]

This case was an action for assessment of damages. The length of the plaintiffs' claim was caused by reason of their being impecunious.

[MAUGHAM L.J. This rule was never intended to apply unless there had been impropriety in the party whose costs were disallowed.]

In *Geen* v. *Herring* (4) the plaintiff brought several actions for breach of covenant to repair and for forfeiture, and joined as defendants a number of weekly tenants. It was held that the costs of serving all the weekly tenants with writs or notices

(1) [1912] 3 K. B. 174, 178.
(2) (1888) 20 Q. B. D. 334, 337.
(3) [1928] 1 K. B. 750, 764.
(4) [1905] 1 K. B. 152.

in the actions were unnecessarily incurred and must be disallowed under sub-r. 20. In the present case the assistant registrar considered the question what was necessary and came to the conclusion that many items of the plaintiffs' bill of costs related to unnecessary matter and must be disallowed. That amounts to a disallowance of costs as being improper, vexatious or unnecessary. It is true that the wording of sub-r. 29 is different from that of sub-r. 20, but that does not prevent the taxation of these costs under sub-r. 20.

[MAUGHAM L.J. On your contention there would be no necessity for sub-r. 29, because it would be covered by sub-r. 20.]

If any matter which is unnecessary is introduced by one side, the other side can at the discretion of the taxing master claim the costs occasioned thereby. It can never be necessary for a plaintiff to put forward a claim upon a wrong basis. In *In re Wormsley* (1) a taxing master was ordered by the Court of Appeal to determine questions raised by the defendant as to the necessity or propriety of proceedings for which charges were made in the bills of costs.

[GREER L.J. referred to *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* (2)]

That case dealt with distinct issues, whereas in the present case there were no distinct issues but merely the assessment of damages. When there has been a large amount of unnecessary costs and expenses incurred it is the duty of the taxing officer to look into the question, and if he finds that the costs have been unnecessarily incurred by one party he must disallow those costs and must allow to the other party the costs occasioned thereby : see *Cracknall* v. *Janson*. (3)

H. I. P. Hallett for the respondents. The decision of Langton J. in upholding the plaintiffs' objections to the defendants' bill of costs and disallowing it altogether is correct. The point turns on the differences between sub-rr. 20 and 29. There cannot be an allowance of the defendants' costs under sub-r. 20 unless there has previously been a disallowance of

(1) (1878) 39 L. T. 85. (2) [1914] 3 K. B. 28.
(3) (1879) 11 Ch. D. 1, 12.

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the plaintiffs' costs under the earlier part of that sub-rule. In the present case the taxing officer has expressly stated that in disallowing the plaintiffs' costs he was acting under sub-r. 29. It was held in *Garrard* v. *Edge* (1) that it is a condition precedent to a party being allowed under sub-r. 20 the costs occasioned to him by improper proceedings of the other party that there must have been a disallowance of the costs of the other party, either by the Court or by the taxing master under sub-r. 20, on the ground that the proceedings were "improper, vexatious or unnecessary." If the contention of the appellants is correct the result would be that whenever costs are not allowed on taxation under sub-r. 29 it would automatically follow that that would be equivalent to a disallowance of costs under sub-r. 20, with the consequences that follow upon such disallowance. That would amount to a revolutionary change in the practice with regard to the taxation of costs. The plaintiffs were given the costs of the reference, and the defendants have not been given the costs of any particular issue. An elaborate discussion on the question of what constitutes an "issue" is contained in the judgment of the House of Lords in *Reid, Hewitt & Co.* v. *Joseph.* (2) In the present case the plaintiffs have merely failed to substantiate part of their claim. The language used in sub-r. 20 is not relevant to the present case; that sub-rule was never intended to penalize a party who had failed to make good part of his claim. Sub-r. 20 is a very special procedure and is intended to apply to a case where the Court is of opinion that any proceeding is improper and vexatious as well as unnecessary, etc., and in such a case the costs thereof may be disallowed. It is only in that event that the sub-rule provides that the party whose costs are disallowed shall pay the costs occasioned thereby to the other party.

R. F. Hayward in reply. The objection was not taken by the respondents that sub-r. 20 was not applicable and that point is not open to them now. It was held in *Cavendish* v. *Strutt* (3) that the rules must be read as a whole, and therefore

(1) 44 Ch. D. 224. (2) [1918] A. C. 717.
(3) [1904] 1 Ch. 524, 530.

the taxing officer must be considered as having a discretion as to allowing the defendants' costs.

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SCRUTTON L.J. This is a troublesome case over a not very large sum ; but the parties have been fighting this case very hard, and apparently they will fight to the end. It began with the sinking of a dredger, which the plaintiffs had bought to enable them to carry out part of the work in connection with a harbour contract which they had in progress, by a ship belonging to the defendants in November, 1928. We are just finishing the history of the unfortunate dredger in March, 1934, so we have not been unduly expeditious in dealing with the matter. The plaintiffs, who had bought the dredger for 4000*l.* and had taken her out to Patras for another 2000*l.*, making 6000*l.* in all, and insured her for 5500*l.*, discovered that by her loss they had lost some 23,500*l.*, which they proceeded to claim. The claim was made up on the basis : We are very poor, consequently we cannot do what a rich man would have done, and so we have had to make a series of elaborate and expensive arrangements of finance, in order to carry out our harbour contract. Langton J. gave judgment, confirming a reference, on those lines for a sum of 19,000*l.* odd, and I can quite understand the defendants' anger, as it was rather provocative to claim for an old dredger more than twice its value on the plaintiffs' own computation. The matter then came to the Court of Appeal, which took the line that it is well established that the damages one can recover for the total loss of a ship are : her value to the owner at the time of the loss, taking into account her engagements, plus interest from the time of the loss ; and we assessed the value at 9000*l.*, being of opinion that that more than amply paid the plaintiffs for what they had lost. On appeal, the House of Lords laid down the same principle on which we thought we were acting, dismissed the appeal, and made the plaintiffs pay three-quarters of the costs, but sent the matter to the registrar to assess the damages on the principles they had laid down. The registrar gave 11,000*l.* odd ; so that the

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plaintiffs got 2000*l.* more on the judgment of the House of Lords.

The question of taxing the costs of the reference then arose. The matter had not been mentioned to us in detail, but we had said: You, the defendants, did not tender any money, or pay any money into Court, and you must pay the costs of the reference. Nobody said to us expressly: "What do you mean by 'the costs of the reference,' the costs of the first reference on the basis of the improper claim, the wrong claim?" and we said nothing as to whether the defendants could have the costs of the reference on the wrong basis. What we should have said if we had been asked, I do not know. The bill of costs of the reference was then submitted for taxation. It was made on the basis that the plaintiffs were entitled to the costs of the reference setting up their wrong claim, including all the matters which became quite unnecessary in view of the decision both of the Court of Appeal and of the House of Lords. That bill went to taxation, and we are told that, brought in at over 1900*l.*, it was taxed down to 654*l.* It was taxed down for the reason that the defendants could not be called upon to pay the costs of proving a wrong claim. There was an appeal by the plaintiffs, and in the appeal the learned assistant registrar, who was taxing, said this: "It is true that there was no order dealing specifically with certain issues, but such an order is only necessary where the intention is to give the opposite party the costs of those issues. In the absence of any such order, it is still open to the taxing master to disallow the costs incurred in putting forward any items of a claim which have been disallowed." The assistant registrar was there taking the view that although there was no order giving the defendants costs, he could still tax the plaintiffs' bill, and he accordingly taxed off all the costs which had been incurred on the wrong claim.

The fact of that heavy disallowance of the plaintiffs' costs seems to have encouraged the defendants to try to get some costs; and so, not having got any order for the costs of any issue from the Court of Appeal or the House of Lords, they brought in the bill, the subject-matter of this appeal, for the

expenses they had incurred in opposing the wrong claim originally put forward. The plaintiffs raise the objection that the assistant registrar has applied wrongly the principle laid down in Order LXV., r. 27, sub-r. 20. In allowing these costs, he stated that his reason for doing so was "that the plaintiffs' costs, which were disallowed, were unnecessary for the attainment of justice under regulation 29 of Order LXV., r. 27." The plaintiffs contend that as there has been no disallowance of their costs under sub-r. 20, the assistant registrar had no power to entertain and tax the present bill.

The matter turns upon two sub-rules, and I read them in this way: sub-r. 20 assumes that one party has been guilty—I am not using the word in an offensive sense—I will say: has in fact incurred unreasonable costs—using perhaps rather a slang phrase, has been piling up costs. That is the sort of thing which is aimed at. The sub-rule uses the words "vexatious," "improper" and "misconduct," and I think it is aimed at cases in which the costs have been piled up. It says that where that is found, whether by order of the Court, or by the taxing master without the Court having made any order, the costs will be disallowed; and secondly, that the party whose costs are so disallowed shall pay the costs occasioned thereby to the other party. It gives power in such a case, without the order of the Court, for the taxing master to require the party who had been unreasonable in incurring costs, to pay to his opponent the costs which the other party has had to incur in order to meet the unreasonable claim. That is quite intelligible. It is quite a separate matter from that which is dealt with in sub-r. 29, which provides that the taxing master shall allow all those costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party. That involves in itself that he may disallow any costs incurred which, in his view, are not necessary for the purpose of defending the rights of any party. It does not involve any allegation that the costs have been piled up. It may involve a finding that the party has put forward a claim in law quite intelligible and proper to put forward, but

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which failed, and accordingly a disallowance of the costs so incurred. The taxing master can allow all the costs which are necessary for defending the proper claim, but sub-r. 29 does not go on to say that he may order the party to pay the costs occasioned to the other side by reason of the costs disallowed. It leaves that out. In my view—and I do not wish to put it too positively, because I am always aware of the fact that when I have said anything too positively, facts may arise which show that I did not consider all the cases I ought to have considered—but in my view, the taxing master ought not to order the party whose costs he strikes out under sub-rule 29 to pay to the other party the costs occasioned to the latter by matters in respect of which costs have been disallowed, unless he has an order of the Court to that effect. It is quite common in the common law, and I have no doubt it is in Chancery, to have a defendant successful on one issue who fails on the whole action, and unless there is an order of the Court that the unsuccessful defendant is to have paid to him the costs of the issue on which he succeeds, I do not think the taxing master should proceed to make an order that, having failed on the issue, although the Court has not made any order about it, the opponent is entitled to the costs of that issue. That seems to me to draw a clear line between sub-rr. 20 and 29, which otherwise would seem too difficult to work. On that view—which I think is the one put forward by the assistant registrar when he taxed the first bill and quite properly struck out a considerable amount of the plaintiffs' bill because it was incurred unnecessarily in respect of a wrong basis—he was not justified in going on and holding under sub-r. 29, under which he says he was acting, that the defendants were entitled to recover against the plaintiffs the costs occasioned to the defendants by the wrong claim. If there had been such an order, he would have been entitled, of course, to tax this bill. The Court was not asked to make such an order, and did not make any such order. Under those circumstances I think that the learned judge was right in the conclusion to which he came, and that this appeal must be dismissed with costs.

GREER L.J. I agree that this appeal should be dismissed with costs, and I also agree with the reasons that my Lord has given. I think there is also another way of stating the reasons why the appeal should fail. There have been two taxations here : the first was a taxation of the plaintiffs' bill, with the result that some 1300*l.* was taxed off in respect of items which the assistant registrar thought the plaintiffs were not entitled to charge against the defendants under the order of the Court. There was an appeal from that taxation and it was dismissed, and in my judgment, there was an end of the taxation of the plaintiffs' bill of costs. I read sub-r. 20 as making the disallowance of part of the bill on the grounds mentioned, a condition precedent for the application of the latter part of the rule, under which something may be given to the other party for having to meet items of claim which never ought to have been in the bill at all. I do not think, after the bill of the successful party has been finally taxed, and there has been an appeal from that taxation and the appeal is dismissed, the taxation of the plaintiffs' bill should be reopened ; and if the disallowance of part of that bill be a condition precedent to any allowance to the other party, then the taxing master was not in a position to make any allowance upon the second occasion. For these reasons I agree with my Lord that the appeal should be dismissed.

MAUGHAM L.J. I agree with the judgment delivered by my brother Scrutton. The matter argued seems to me one of very great importance on the question of the taxation of costs arising from proceedings, and I therefore desire to add a few words.

Order LXV., r. 27, sub-r. 20, consists, I think, of three separate parts, which have to be considered separately if one wants to understand the true construction of that sub-rule. The first part provides that a Court or a judge, on the hearing of any proceedings—I may point out that sub-r. 20 considers only taxation of costs arising out of proceedings, unlike sub-r. 29, which refers to any kind of taxation—may give a certain direction, a direction relating to the costs of a number of

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matters which arise in the course of proceedings, and in regard to which excessive costs may have been piled up by a litigant. Two different things may be done. The Court or a judge may direct that the costs in relation to the improper, vexatious and unnecessary matters be disallowed. It happens occasionally in the course of an action that a judge may see that some costs are hopelessly wasted costs, and at the trial he may make the direction himself—I have done it more than once—or he may do something different : he may direct the taxing master to look into those matters " and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence." Whether the Court acts, or whether the taxing master is directed to act, in each case, the action to be taken is of a discretionary character. Now comes in part 2 of this rule, which is not discretionary ; it is something which follows automatically from the preceding part of the sub-rule. It is that " in such case the party whose costs are so disallowed, shall pay the costs occasioned thereby to the other parties." Then follows the third part of the rule, which was added seventy years ago, because originally the power could only be exercised by a direction obtained from the judge. The third part of the rule says : " in any case where such question shall not have been raised before and dealt with by the Court or Judge, it shall be the duty of the taxing officer to look into the same . . . . for the purpose aforesaid," and then the rule states quite briefly that " the same consequences shall ensue as if he had been specially directed to do so." That third part of the rule obviously means, without any doubt, that the taxing master is to exercise his discretion as to whether any of the sort of things referred to in the rule have occasioned costs in such a way that the matters in question may be described as improper, vexatious, unnecessary, etc. Once having held or decided that the matters in question are improper, vexatious, unnecessary, etc., the consequence inevitably follows that the party who has so occasioned those costs is to pay the costs so occasioned to the other party. I may add that under

sub-r. 21, having once acted under sub-r. 20, he may make a set-off.

What is the meaning of the phrase "Improper, vexatious, unnecessary, or vexatious, or to contain unnecessary matter," etc.? It is true it contains the word "unnecessary," but does the word "unnecessary" there get no colour from the context? I think it is quite plain that it does, because if something is improper, it is obviously unnecessary as regards the other side, and so is vexatious. "Unnecessary" there does not mean, and cannot possibly mean, any matter without which the party whose costs are being taxed could not proceed to trial. It must be very much less wide than that. The contention on the part of the appellants is that if the taxing master has once disallowed certain costs, presumably under the general direction given him in Order LXV., including sub-r. 29 of r. 27, it follows that the same consequences are to result as if he had found the items in question were improper, vexatious and unnecessary, or contained vexatious or unnecessary matters under sub-r. 20. In my opinion it is quite impossible to hold that view if attention be paid to the form of the two rules, and if any regard be had to the history of the matter. Originally, this right of making a litigant, entitled under an order to costs, pay costs which the other side had incurred, was a very special order, made, as I have said, by a Court or a judge at the trial; and this addition of a portion to the rule, which makes it mandatory for the taxing master to look into the matter and exercise his discretion without any special direction, is not intended entirely to revolutionize the whole practice with regard to taxation, and to make it necessary, in every case where items are disallowed upon a taxation, for the taxing master to see whether, as a result of that, he ought not to allow to the other side the costs occasioned by the matters which are disallowed. Sub-rr. 21 and 22 are contrary to such a view; and as a matter of construction I am satisfied that the word "unnecessary" there must be read ejusdem generis with the other words in connection with which it is found in two places—namely, unnecessary in the sense of being improper, vexatious or

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unreasonable; and accordingly the taxing master, in order that he may be enabled to cause the opposite party to pay the costs occasioned by the unnecessary matters, must exercise his discretion and make a finding, under sub-r. 20, to the effect that the costs in question come within the description of the words I have read, in the sense of some impropriety or unreasonableness in connection with the incurring of those costs.

I will only add that, as I understand the decision of the Court of Appeal in *Garrard* v. *Edge* (1), Cotton L.J. took the same view, and I think the case of *Geen* v. *Herring* (2), to which reference has also been made, is a case where again it was the existence of wholly unreasonable costs which justified the making of a special finding under sub-r. 20. In the present case, for the reasons given by Scrutton L.J., I think it is clear that the taxing officer, the assistant registrar, was acting under sub-r. 29, and accordingly he has not exercised his discretion, or given himself any right, under sub-r. 20. The result is that the objection by the plaintiffs must succeed, and the appeal must be dismissed.

Solicitors for the appellants: *Thomas Cooper & Co.*

Solicitors for the respondents: *William A. Crump & Son.*

(1) 44 Ch. D. 224. (2) [1905] 1 K. B. 152.

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Shipping—Costs—Taxation—Appeal and Cross-appeal dismissed with costs.

In an action of damage by collision the plaintiffs' vessel was held four-fifths to blame and the defendants' vessel one-fifth to blame. The defendants appealed and the plaintiffs cross-appealed. The Court of Appeal dismissed both appeal and cross-appeal with costs. On taxation the plaintiffs' bill of costs of 802*l.* 14*s.* 6*d.* was taxed down to 755*l.* 17*s.* 9*d.* The bill of costs of the defendants, the unsuccessful appellants, lodged for taxation at 1935*l.* 10*s.* 1*d.*, of which a moiety was claimed from the plaintiffs, was taxed down to 91*l.* 4*s.* 11*d.* on the ground that, beyond a possible slight prolongation of the hearing and a few small items in connection with the notice of the cross-appeal, the defendants' costs had not been increased by reason of the cross-appeal. On a summons for a review of the taxation of the bills, Bateson J. held that the bills must go back to the assistant registrar for apportionment of the costs of each side between the appeal and the cross-appeal, with reference to the actual course taken and the time properly occupied on the hearing of the appeals. The plaintiffs appealed :—

Held, that the learned judge was wrong in applying the principle of apportionment ; that in the absence of a special order the principle of no apportionment laid down as to claim and counterclaim cases in *Medway Oil & Storage Co.* v. *Continental Contractors, Ld.* [1929] A. C. 88, applied ; and that the defendants (respondents to the cross-appeal) were only entitled to the extra costs which they had incurred by reason of the cross-appeal.

Decision of Bateson J. reversed and that of the assistant registrar restored.

Appeal by the plaintiffs in an action of damage by collision from a decision of Bateson J. on an objection to taxation of costs.

The plaintiffs were the Union Castle Mail Steamship Co., Ld., owners of the s.s. *Guildford Castle*, and others ; the defendants were the China Mutual Steam Navigation Co., Ld., the owners of the motor vessel *Stentor*.

On May 31, 1933, the *Guildford Castle* and the *Stentor* came into collision in the Elbe. Bateson J. pronounced both vessels to blame and held that the damages should be borne as to four-fifths by the owners of the *Guildford Castle* and as to one-fifth by the owners of the *Stentor*. The owners of the *Stentor* appealed and the owners of the *Guildford Castle* cross-appealed. Both parties by their notice of appeal alleged

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that the other vessel was alone to blame, but on the hearing of the appeals counsel for the *Guildford Castle* did not contend that she was free from blame but argued that she was less to blame than the *Stentor*. The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) dismissed both appeal and cross-appeal with costs.

The costs of the plaintiffs (respondents to the appeal) as lodged for taxation amounted to 802*l.* 14*s.* 6*d.* and the assistant registrar allowed 755*l.* 17*s.* 9*d.* The costs of the defendants (appellants and respondents to the cross-appeal) as lodged amounted to 1935*l.* 10*s.* 1*d.* These costs, a moiety of which was claimed against the plaintiffs, were taxed down to 91*l.* 4*s.* 11*d.*

In reply to the defendants' objections to the taxation the assistant registrar's answer was as follows : " In my opinion the only question to be determined on this taxation was : ' were the appellants' costs increased by reason of the cross-appeal, and, if so, by how much ? ' The cases upon which I found this opinion are *The Lauretta* (1) and *Robinson* v. *Drakes*. (2) I think there are other cases, but these are sufficient to show what I believe to be the recognized practice in cases where appeal and cross-appeal have been dismissed with costs and the appellants' costs have not been increased by reason of the cross-appeal. *The Bremen* (3) is not in point. There the order was that there should be no costs on either side. *Jones* v. *Stott* (4) really emphasizes the principle I have stated, as in that case the appeal and cross-appeal dealt with entirely distinct questions. Except in respect of the actual notice of cross-appeal and small items connected therewith I was unable to find any indication that the appellants' costs had been increased either in the brief or elsewhere, nor was the appellants' representative on the taxation able to point to anything suggesting such increase. As a matter of fact, I rather strained matters in the appellants' favour by such allowances as I made in the matter of time occupied on the hearing, for although there was nothing to show that the hearing of the

(1) (1879) 4 P. D. 25.
(2) (1883) 23 Ch. D. 98.
(3) [1931] P. 166.
(4) [1910] 1 K. B. 893.

appeal was in any way prolonged by reason of the cross-appeal, it was just possible that there might have been some slight prolongation, and I gave the appellants the benefit of the doubt."

The defendants applied for the taxation to be reviewed, and Bateson J. ordered "that the taxation of the appellants' (respondents to cross-appeal) and the respondents' costs herein be reviewed by apportioning the costs of each side between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied on the hearing of the appeals," and he accordingly referred the bills back to the assistant registrar.

The plaintiffs appealed.

E. A. Digby K.C. and *G. H. Main Thompson* for the appellants. The assistant registrar correctly followed the practice where both appeal and cross-appeal have been dismissed with costs. He gave the plaintiffs, the owners of the *Guildford Castle*, the general costs of the defendants' unsuccessful appeal, and the defendants were given the additional costs occasioned to them by the plaintiffs' unsuccessful cross-appeal, a comparatively small amount, as the defendants' costs were hardly increased at all by the presentation of the cross-appeal. The order of Bateson J. was in identical terms with that made in *Jones* v. *Stott* (1), where very different considerations applied, for the appeal and cross-appeal in that case dealt with totally distinct questions and the appellants' costs had been largely increased, inasmuch as the main appeal was the cross-appeal. *The Lauretta* (2) is absolutely in point: see also Roscoe's Admiralty Practice, 5th ed., p. 369, and *Medway Oil & Storage Co.* v. *Continental Contractors, Ld.* (3), where the whole matter and all the cases were reviewed by the House of Lords and, in the absence of special directions, the principle of apportionment was disapproved of.

Kenneth Carpmael for the respondents. In following *Jones* v. *Stott* (1), and holding that the appeal and cross-appeal were

(1) [1910] 1 K. B. 893. (2) 4 P. D. 25.
(3) [1929] A. C. 88.

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separate and distinct and that the costs should be apportioned, Bateson J. was right. That case was not disapproved of by the House of Lords in *Medway Oil & Storage Co.* v. *Continental Contractors Ld.* (1) and by inference it stands ; further, the House of Lords decision had reference to claim and counter-claim and not to appeal and cross-appeal. Both in *The Lauretta* (2) —which was before the Maritime Conventions Act—and in *Robinson* v. *Drakes* (3) orders as to costs were made at the trial, and they are not authority for the general proposition stated by the assistant registrar, who has misinterpreted the passage in Roscoe's Admiralty Practice relating to *The Lauretta.* (2) The note in Williams' and Bruce's Admiralty Practice (3rd ed., p. 549) merely states that " in cases where the respondents have given notice that they intended to apply to reverse or vary the decision of the Court below, and have not succeeded in the intended application, the costs occasioned by the notice so given will usually be deducted." Even applying the claim and counterclaim rule the assistant registrar took too limited a view. The case on the *Stentor's* appeal was confined to the narrow limits of the judgment against her for her failure to stop as soon as she heard the whistle of the *Guildford Castle*, whereas, for the purpose of the cross-appeal, it was necessary to cover the whole ground of the navigation of both vessels ; a proper allowance, therefore, in respect of costs should have been made for this in the *Stentor's* bill of costs, and only a proportion of such items in the *Guildford Castle's* bills of costs as were allowed in full should have been allowed. [See the Annual Practice, 1934, pp. 1376, 1382, and The Yearly Practice, 1934, p. 1244.] The bills, therefore, were rightly referred back to the assistant registrar for review on the principles stated by the learned judge. [Reference was also made to *The Bremen.* (4)]

No reply was called for.

SCRUTTON L.J. This case deals with a matter which has arisen in a series of cases of the same sort since the original

(1) [1929] A. C. 88.
(2) 4 P. D. 25.
(3) 23 Ch. D. 98.
(4) [1931] P. 166.

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decision by Fry J. in *Saner* v. *Bilton*. (1) The *Guildford Castle* was coming down the River Elbe and the *Stentor* was bound up the river, and they ran into each other. This Court made the order that the appeal and cross-appeal from the decision of Bateson J. should be dismissed with costs, and the registrar was left to work out the taxation. Whether under the circumstances the Court of Appeal would have been wiser to do what they did in *The Bremen* (2), namely, order no costs to either side, to avoid a serious quarrel about taxation, is a matter we shall have to consider the next time we come across this class of case, but that was the order which the Court of Appeal made: "appeal and cross-appeal dismissed with costs."

We are left to our memory and the assistance of counsel, also acting apparently on their memory, as to exactly what happened in the Court below and in our Court, because we have not a copy of the judgment. As I understand it, the *Guildford Castle* was found to be four-fifths to blame because (1.) she had gone over to the wrong side of the river, (2.) she was going too fast, and (3.) although in the neighbourhood of fog, she had not been blowing her whistle properly. The *Stentor* was found one-fifth to blame because, having fog ahead, she did not stop her engines as soon as she heard the first whistle of the *Guildford Castle*. Perhaps the *Stentor* was a little lucky in getting off in that way, because our assessors advised us that in view of the misty weather, she had been coming up too fast before she heard the other vessel.

On the order that we made, that each appeal should be dismissed with costs, the matter went to the assistant registrar, who took the view (I understand, not on the claim and counterclaim cases, but on *The Lauretta* (3) and what we find in *Jones* v. *Stott* (4)) that the right method of carrying out our order was on these lines: "The *Guildford Castle* appeals against all liability; I treat her cross-appeal as a separate appeal and I order her to pay the costs which are occasioned by her failing on that separate appeal." The taxation was, of course, on two appeals, and the assistant registrar dealt in each case

(1) (1879) 11 Ch. D. 416.
(2) [1931] P. 166.
(3) 4 P. D. 25.
(4) [1910] 1 K. B. 893.

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with an appellant who had a cross-appeal against him, and said that the amount to be determined was the amount that the appellants' costs were increased by the cross-appeal. He said: "The cases upon which I found this opinion are *The Lauretta* (1), and *Robinson* v. *Drakes*. (2) I think there are other cases, but these are sufficient to show what I believe to be the recognised practice in cases where appeal and cross-appeal have been dismissed with costs and the appellants' costs have not been increased by reason of the cross-appeal."

The owners of the *Stentor* appealed to Bateson J., and each appeal is dealt with in the same way. "The appellants as respondents to the cross-appeal object to the taxation of their costs and to the taxation of the respondents' costs as cross-appellants, on the ground that both the costs on behalf of the appellants as respondents to the cross-appeal and the respondents' costs have been taxed on a wrong basis, and that an apportionment should have been made of such items in each bill as refer to work done or payments made which have been available for the use of each party in resisting their opponents' and supporting their own appeal." The same thing was said about the other vessel. The learned Judge being in Chambers we have no note of his judgment, and it is doubtful what cases he looked at, but he set aside the taxation and made this order: "The Judge ordered that the taxation of the appellants' (respondents to the cross-appeal) and the respondents' costs herein be reviewed by apportioning the costs of each side between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied on the hearing of the appeals, and he referred the said bills back to the assistant registrar."

In my view the decisions that have been given in claim and counterclaim cases, which raise almost exactly the same point, though under different circumstances, ought to be considered as the guide in this matter. The matter arose before Fry J. in *Saner* v. *Bilton* (3) over 50 years ago. At that time there was a considerable doubt, and Fry J. consulted with all

(1) 4 P. D. 25. (2) 23 Ch. D. 98.
(3) 11 Ch. D. 416, 417*n*.

the taxing masters of both Divisions to ascertain what was the practice, and all the taxing masters advised him that when there was no express authority they thought the right principle was on these lines : " The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the common law masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions." Claim and counterclaim cases went along on those lines until Atkin and Younger L.JJ. had a case (*Christie* v. *Platt* (1)) which induced them to believe that the principle in *Saner* v. *Bilton* (2) was wrong. That was a case where the *Saner* v. *Bilton* (2) ruling resulted in the plaintiff getting 200*l.* and the defendant 3*l.*, which they said did not look right, and they laid down the principle of apportionment. Shortly after that Sargant L.J. and I had the same sort of point raised in a running-down case, *Wilson* v. *Walters* (3), where each side was appealing, and we took the view that *Saner* v. *Bilton* (2) was applicable, and that apportionment should not be allowed. The matter then came up before the House of Lords in 1929, in the *Medway Oil & Storage Company* v. *Continental Contractors Ld.* (4), a case which raises the point very neatly. I will not go into details, but the head note in the House of Lords is as follows : " Where a claim and counterclaim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of special directions by the Court there should be no apportionment. The same principle applies where both the claim and the counterclaim have succeeded. *Saner* v. *Bilton* (2) ; *Crean & Sons, Ld.* v. *M'Millan* (5) ; and *Wilson* v. *Walters* (3)

(1) [1921] 2 K. B. 17.
(2) 11 Ch. D. 416.
(3) [1926] 1 K. B. 511.
(4) [1929] A. C. 88.
(5) [1922] 2 I. R. 105.

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approved and followed. *Christie* v. *Platt* (1) explained and distinguished." Lord Blanesburgh, who, having been a party to *Christie* v. *Platt* (1), was a member of the Court in *Medway Oil & Storage Co.* v. *Continental Contractors, Ld.* (2), said that he agreed that *Christie* v. *Platt* (1) had gone very much further than they intended, in view of the previous decisions. I think that is very nearly enough to be a decision against apportionment. It is a decision on this principle : the plaintiff appeals, treat that as a separate matter ; if he fails, he is bound to pay all the costs occasioned by the defendant resisting his appeal. If there has been a cross-appeal, the matter is not to be dealt with by apportionment between the two, but only those extra costs which are occasioned by the cross-appeal are the subject-matter of the order for costs on the cross-appeal.

That seems to be the principle on which the assistant registrar has proceeded, and to be entirely justified on the decision of the House of Lords ; the learned judge's order appears to me to be a *Christie and Platt* (1) order—apportionment. I think the decision of the House of Lords shows that apportionment is not the proper principle to apply, and I therefore think that this appeal must succeed.

At the same time I desire to say, as I said in *The Young Sid* (3), which is generally remembered as being the case of *The Ocean Swell*, that there is to be no binding of the Courts as to the orders they make in this way. Each judge, under the present system now set up by Order LXV., r. 1, has discretion, and he can make such order as he likes. If he makes an order in common form, it is no doubt important that it should be known what the order in common form means ; but nothing is to bind this Division or any other Division to make any particular form of order. If the judge thinks a better result will be obtained, as in *The Bremen* (4), by saying no costs, or by making an express order as to apportionment, he is perfectly at liberty to do it. It is only if he follows a common form order, which up to this time has had a meaning, that any rule of taxation, or any rule as to the order which should be

(1) [1921] 2 K. B. 17.
(2) [1929] A. C. 88.
(3) [1929] P. 190.
(4) [1931] P. 166.

made, applies. I say that because I do not want there to be too great a rigidity in any sort of orders as to costs ; the judge should make such an order as, knowing the practice, he thinks will give a proper result between the parties.

In this case the Court of Appeal did make an order which at the time, in my view, had a particular meaning, and I think it had the meaning which the taxing officer has followed. If we had meant that there was to be apportionment, we should have said so ; but we did not say anything about it. For this reason I think the appeal succeeds and the objections to the taxation fail.

GREER L.J. I agree. I think that the learned judge was not entitled to come to the conclusion that the taxation had been conducted upon a wrong principle ; and if he was not so entitled it was not for him to work out the result in pounds, shillings and pence.

It is true that the learned assistant registrar based himself upon two cases : *The Lauretta* (1) and *Robinson* v. *Drakes* (2), and Mr. Carpmael is right when he says that those are not decisions as to what is to happen in a case where the appeal is dismissed with costs, and the cross-appeal is dismissed with costs ; they are only an indication as to what the judges thought would be the appropriate result of that position. They did not leave the matter undecided in their judgments ; they made a special order in each case. We are told that the principle upon which the assistant registrar acted is the principle on which the taxing officers of the Admiralty Court have been acting for a considerable time when the order of the appellate Court has been similar to that which was made in this case.

I agree with my Lord that, in looking for the right principle, we ought to be guided by what the House of Lords said in *Medway Oil & Storage Co.* v. *Continental Contractors, Ld.* (3), in which Lord Haldane examined all the authorities, from *Saner* v. *Bilton* (4) downwards, dealing with the proper way to tax the costs on claim and counterclaim.

(1) 4 P. D. 25.
(2) 23 Ch. D. 98.
(3) [1929] A. C. 88.
(4) 11 Ch. D. 416.

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THE STENTOR.

Greer L.J.

I think the position of the appellant in appeal and cross-appeal is analogous to that of claim and counterclaim. My recollection of the present case is that the appellants, the owners of the *Stentor*, in order to prove that she was not to blame, went into the whole of the facts, including all the facts relating to the conduct of the other vessel; and if there had been no cross-appeal the costs would have been very nearly identical with what they in fact turned out to be. Having regard to the fact that there was a cross-appeal, which in form challenged the blame attached to the *Guildford Castle* but in substance, as presented to us, was only supported by an argument that the *Stentor* was more to blame, and inasmuch as some of the costs or some of the time may have been taken up in argument as to whether the proportions should be altered, no doubt the assistant registrar was entitled to say that the costs which were awarded to the respondents should be diminished by such costs as were due to their appeal. In my judgment this meets the justice of the case.

As a general rule it is desirable to look at the matter from the point of view of substance. Who really is the successful party in the litigation in the Court below in the case of claim and counterclaim; and who is really the successful party in appeal and cross-appeal? I think in this case the respondents were successful and that they ought to have, in substance, all the costs which have been given to them by the assistant registrar.

I have observed in the various cases which have been cited that these questions have given rise to considerable differences of opinion, especially in cases on claim and counterclaim. When counterclaims were introduced they were a substitute for cross-actions, and in the early days they were treated as if they were cross-actions; but latterly it was appreciated that in substance the counterclaim might really be a defence, and if it fails, all that happens in regard to costs is that the addition to the costs by reason of the counterclaim should be at the expense of the counterclaiming defendant. I think that a similar result should follow with regard to a cross-appeal—namely, that any costs attributable to the cross-appeal which

have increased the costs of the parties to the proceedings in the cross-appeal, ought to be given to the successful party in that cross-appeal. It might be in some cases that that would be a substantial figure ; it might be in others that the experienced taxing officer would be able to come to the conclusion that the figure was not a substantial one, as he has done in this case.

I agree with my Lord, therefore, that this appeal should be allowed and the order of the assistant registrar restored.

Solicitors for the appellants (plaintiffs) : *Parker, Garrett & Co.*

Solicitors for the respondents (defendants) : *Stokes & Stokes, for Alsop, Stevens & Collins Robinson, Liverpool.*

E. C. M. T.

VELASCO *v.* CONEY.

1934 *May* 10, 15.

Will—Testamentary exercise of power of appointment—Execution of will valid by both English and foreign law—English assets—Foreign domicil of testator—Revocation of will conformably with law of domicil only—Probate refused—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 20.

A testatrix domiciled in Italy purported to exercise a special power to appoint English assets by a will validly executed according to English and Italian law alike. She subsequently revoked the will, complying with Italian law, but without the complete formality necessary for its revocation according to English law. The appointee contended that a will exercising the power could be revoked only according to the formalities imposed by English law. A party entitled to share in the appointed assets in default of appointment relied on the effectual revocation of the will according to Italian law :—

Held, that in the absence of authority the policy of the Court must lean towards giving effect to the intention of the testatrix and ought not to impose upon her as necessary a compliance with English requirements as to revocation which was unknown to the law of her domicil, and that the party entitled in default of appointment must succeed.

THE deceased Thekla Florence de Santiyan y Velasco, of English birth and parentage, died on October 19, 1931,

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domiciled in Italy. The deceased had married the plaintiff in the present suit, a domiciled Italian, on April 16, 1905. There was no issue of the marriage. Under the will of an uncle, proved in 1910, the deceased had power when married, by deed or will, to appoint any part of the income of her share in the residue under the will in favour of a husband for his life. By a will dated July 25, 1910, written and executed in such a manner as to be a valid testamentary paper according to the laws of England and Italy alike, the deceased purported to exercise this power in favour of the plaintiff.

The plaintiff claimed admission to probate in England of the contents of the will as contained in a completed draft thereof.

The defendant was a party entitled to share in the appointable property in default of appointment and claimed that the will had been revoked. The will was never revoked or destroyed by the deceased or by any other person in her presence and by her direction so as to effect its revocation according to English law; it was, however, destroyed on June 2, 1914, in England, by the English solicitor of the deceased without the presence of the deceased in pursuance of a letter or mandate dated May 29, 1914, written by the deceased in Italy. At the date of the death of the deceased, who had not purported to deal further with the appointable property, the question arose whether what occurred in 1914 was or was not an effectual revocation of the will.

The contents of the destroyed will were proved and an expert in Italian law gave evidence that the original being holograph was a valid will in Italian law, that the letter or mandate dated May 29, 1914, was effective in Italian law to revoke it and further, that the mandate on its receipt by the solicitor, would have been effective to produce revocation even without the physical destruction which had in fact followed its receipt.

Hon. Victor Russell for the plaintiff. As the will was executed according to English law and dealt with English property its revocation as the exercise of a power over

English property could only be effected conformably to the English law. This has not been satisfied: see the Wills Act, 1837, s. 20. The law is generous in admitting the exercise of an English testamentary power by a foreign national in spite of questions as to domicil. *Murphy* v. *Deichler*. (1) The reason is explained in *Pouey* v. *Hordern*. (2) The exercise of the power was not in reality a disposition of property; it was merely a nomination to succeed to property already disposed of by the creator of the power.

R. F. Bayford K.C. (*H. W. Barnard* with him) for the defendant. The deceased made a will according to the law of England and Italy alike, and she has completely revoked it by Italian law, which was the law of her domicil. She had the power of revocation by either law. As in our law the will only speaks from her death, the power to revoke it must be operative at any time prior to death. *Murphy* v. *Deichler* (1) is distinguishable.

Cur. adv. vult.

May 15. LANGTON J. This case raises a novel and not unimportant point; the facts are hardly likely ever to be repeated, but the principles involved may have importance in other fields. It concerns the affairs of a lady known as Signora Thekla Florence de Santiyan y Velasco, who died on October 19, 1931, leaving no issue. This lady was of English birth, but married an Italian gentleman, who is the plaintiff in this action. The marriage took place on April 16, 1905, and the lady (although thereby acquiring a peculiarly Spanish name) became in consequence an Italian subject. She appears to have spent the greater portion of her life in Italy, and there is no suggestion that she acquired any but an Italian domicil. By a will dated January 31, 1893, and proved on April 28, 1910, Signora Velasco's uncle, Mr. Alfred Ames, left to her, by a series of complicated provisions, a power of appointment to certain personal property. On July 25, 1910, the Signora exercised this power by means of a will, drafted in England, but executed in Rome, which she took considerable

(1) [1909] A. C. 446. (2) [1900] 1 Ch. 492.

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pains to secure should be valid according to both English and Italian law. In exercise of her power she appointed her husband, the plaintiff in this action, to succeed to the whole of the property named in her uncle's will. On May 29, 1914, she signed an authority to the English solicitor, who prepared this English will, to destroy her will of July 25, 1910. This document, which in Italian law is called a mandate, bears upon its face, in the handwriting of the solicitor who prepared the will, the words "destroyed 2 June, 1914." There is no doubt at all that the will of July 25, 1910, was destroyed and there is equally no doubt that it was not destroyed in the presence of the deceased, the testatrix Signora de Santiyan y Velasco. At the time in question the Signora was still in Italy.

On October 19, 1931, the Signora died, leaving no issue, and without purporting to make any fresh exercise of her power of appointment. It is not disputed that if the power was not exercised by the lady, the property falls to be divided amongst certain beneficiaries under the will of Mr. Alfred Ames. The defendant in this action is one of these beneficiaries.

Accordingly the dispute centres upon the single point whether the intended revocation by the Signora in 1914 of the will which she executed in 1910 was or was not effectual. Counsel for the plaintiff contended that since the will was an English will made according to English law, and dealing with English property, it could only be revoked by a process effectual in English law. The plaintiff, he said, came to the English Court and asked for probate of an English document which had never been revoked according to English law. Sect. 20 of the Wills Act, 1837 (1 Vict. c. 26), lays down in the clearest language the requirement that a will can only be revoked by destruction if destroyed by the testatrix herself, or by someone else in her presence and by her direction. The will of July, 1910, had been destroyed in the absence of the testatrix, and had therefore never been revoked.

The plaintiff proved in evidence the completed draft of the will of July, 1910, and asked that a presumption should be drawn that it was a valid exercise of the power of appointment

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in the circumstances. Counsel cited two authorities to show that a power of appointment by will can be exercised by a foreign national by means of an English will notwithstanding difficulties as to domicil. He urged that the exercise of the power of appointment constituted an exception to the general rule and that English law had always been specially generous in admitting the exercise of powers of appointment by will: see *Murphy* v. *Deichler*. (1) In the case of *Pouey* v. *Hordern* (2), Farwell L.J., sitting in Chancery, explained the reason upon which this exception to the general rule is founded. The power of appointment is not in reality a disposition of property at all, but merely a nomination to one or more out of a given number of persons to succeed to property which has already been disposed of or settled.

Counsel for the defendant did not challenge these general propositions, and did not dispute that the will of July, 1910, could properly be admitted to probate if it stood unrevoked; his case was that the Signora Velasco, who was an Italian subject, had in July, 1910, made a will which was valid both by English and by Italian law. Having done this with no little circumspection, she had in 1914 done everything within her power to revoke this will. The revocation was by Italian law completely effectual. It failed in English law only because by the provisions of the Wills Act, of which she was no doubt ignorant, the will had been destroyed in her absence.

A distinguished Italian lawyer was called before me, and gave clear and, I imagine, incontestable evidence concerning the Italian law. His evidence was not challenged on behalf of the plaintiff. He said, and I find upon his evidence as facts, first, that the will of 1910 was a good will in Italian law because it was written in its entirety by the testatrix herself, and secondly, that the letter of May 29, 1914, is effective in Italian law to revoke the will, and indeed would have been effective so to do even if the solicitor to whom it was addressed had not actually destroyed the will, provided that he had duly received the letter.

I have to determine in these circumstances whether I ought

(1) [1909] A. C. 446. (2) [1900] 1 Ch. 492.

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to apply the Italian or the English law to this question of revocation. Counsel on either side were unable to produce any authority to assist my decision, nor have I been able to discover any authority for myself. Assuming, therefore, that the question is bare of authority, I have no hesitation in applying the Italian law. The testatrix was an Italian subject. Her will of July, 1910, was made and revoked in accordance with Italian law. It is writ large in the English law of probate that the Court will lean always towards giving effect to the intentions of the testator. The intentions of Signora Velasco in this instance are beyond cavil or dispute. The very exception which would have enabled her will in this case to be admitted to probate is in itself an example of the Court's indulgence towards testamentary intentions. It appears to me that it would be little short of absurd to impose upon a person thus favoured by English law the full rigour of a requirement to be found only in an English statute which was not otherwise binding upon her. Furthermore, none of the authorities which I have consulted seem to make it imperative upon the Court to admit a document such as the will in this case to probate. As I understand the matter, such a document may be admitted to probate if the Court is of opinion that the reason and justice of the case require it. In my view, reason and justice in the present case point in the opposite direction and, therefore, this action fails and the defendant succeeds.

Solicitor for the plaintiff: *A. M. Oppenheimer.*
Solicitors for the defendant: *Burch & Co.*

R. M. M.

SANDLER *v.* SANDLER (DAVIES AND JOHNSTONE, CO-RESPONDENTS).

C. A.
1934
May 7, 8.

Divorce—Husband's Petition—Damages—Collusion—Supplemental Petition—Prayer of original Petition dismissed—Effect on supplemental Petition—Petitions to be treated as one Petition.

A supplemental petition for divorce is not a separate proceeding but is part of the original petition.

Where therefore a petition by a husband was dismissed on the ground of collusion, it was held by the Court of Appeal that a supplemental petition, although untainted by collusion alleging further acts of adultery since the date of the original petition, must also be dismissed.

Decision of the President on this point reversed.

APPEAL and CROSS-APPEAL from the President.

The husband by his original petition charged the wife with adultery with the co-respondent Davies and by amendment of the original petition and a supplemental petition with the co-respondent Johnstone, against whom he claimed damages. The respondent filed an answer denying the charges. This answer had been struck out. The co-respondent Davies did not appear in the suit. The co-respondent Johnstone filed an answer denying the charge but at the hearing disputed the damages only. The hearing was before the President sitting with a special jury.

On the question of collusion reserved to the Court, the President found that the original petition had been presented in collusion between the petitioner and the respondent and that it must, accordingly, fail. He, however, left the charge of adultery with Johnstone and the issue as to damages against Johnstone to the jury. He held that as the supplemental petition, which went to both of these matters, was untainted by collusion, it would be a mere technicality that the supplemental petition and its further charges should fail along with the original petition. He said that such a course would merely result in putting the petitioner to the filing of a fresh petition alleging the further charges afresh, a course that the petitioner would be entitled to take in the absence of further collusion.

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The jury found adultery against the co-respondent Johnstone and assessed the damages at 2500*l.*

The President found adultery against the respondent on the supplemental petition, dismissed the prayer of the original petition and pronounced a decree nisi on the supplemental petition.

The co-respondent Johnstone appealed.

The petitioner cross-appealed against the decision as to collusion.

The appeal and cross-appeal were heard on May 7 and 8, 1934.

The only question calling for a report is that arising on the appeal—namely, as to the effect on the supplemental petition of the dismissal of the petition on the ground of collusion.

The arguments and parts of the judgments dealing with the question of collusion, the subject-matter of the cross-appeal, are therefore omitted.

Wallington K.C. and *G. C. Tyndale* for the appellant Johnstone. The Court having found that there was collusion in regard to the allegation of adultery with the first co-respondent Davies, not only was the whole of the main petition tainted thereby but also the supplemental petition, which could not be separated from the main petition. The President has sought to get over the difficulty by dismissing the prayer of the main petition, but there is no justification for this. Collusion being alleged, the President ought to have decided this question first, and having held that there was collusion he ought to have dismissed the petition and supplemental petition without allowing the case made by them to go to jury. This would not prevent the petitioner from bringing a new petition free from the taint of collusion. The supplemental petition is in form entirely dependent on the main petition, and merely alleges new acts of adultery subsequent to the date of the main petition. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 178, sub-s. 2, provides that when collusion has been proved with either of the " respondents " the petition—not the prayer of the petition—must be dismissed. The

"respondents" there includes a co-respondent: see Matrimonial Causes Rules, 1924, r. 5. It is to be noted that s. 178, sub-s. 3, only empowers the Court to pronounce a decree of divorce if satisfied that the case for the petitioner has been proved and that there has been no connivance, condonation or collusion.

The practice is all in favour of the view that a supplemental petition is dependent on the main petition: "Directions issued in Divorce Registry affecting practice and procedure in matrimonial business," Directions Nos. 69, 71 and 74: see Rayden & Mortimer on Divorce, 3rd ed., App. III., pp. 595, 596.

If a petition and a supplemental petition are on the file it is impossible to withdraw the petition and leave the supplemental petition on the file as an effective document. Direction 74 is material as showing that a petition and a supplemental petition could not contain two inconsistent prayers. In the present case on its form the supplemental could not stand alone. There are cases where a supplemental petition brings in a new co-respondent for the first time, and in such case the supplemental petition is much fuller: see the form of supplemental petition in Rayden & Mortimer on Divorce, 3rd ed., p. 612. While it is true that the practice is to make an affidavit of no connivance or collusion on filing a supplemental petition, the proceedings are based on only one citation: *Smith* v. *Smith* (1), a case which related to an amended petition but the principle of which applies equally to a supplemental petition. In *Lapington* v. *Lapington* (2) it was recognized that there is in principle no difference between a supplemental petition and an amendment of the original petition: see also Browne & Latey on Divorce, 11th ed., p. 471, which states the circumstances in which it is competent to dismiss the prayer of the petition.

[SLESSER L.J. referred to *Webb* v. *Webb*. (3)]

In *Schira* v. *Schira and Sampajo* (4) it was made clear that the continuance in existence of a petition is essential to enable

(1) (1863) 3 Sw. & Tr. 216.
(2) (1888) 14 P. D. 21, 22.
(3) (1828) 1 Hag. Ecc. 349.
(4) (1868) L. R. 1 P. & M. 466.

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a respondent to enforce a claim in answer. The position in regard to a supplemental petition is the same and it cannot be maintained after the petition has been dismissed.

[SLESSER L.J. In *Borham* v. *Borham and Brown* (1) the filing of a supplemental petition was allowed only on condition of the petition and supplemental petition being consolidated.]

Consolidation was not necessary, as the position would have been the same without it. The President ought to have dismissed the petition in accordance with s. 178, sub-s. 2, of Supreme Court of Judicature (Consolidation) Act, 1925, and then the supplemental petition must have been dismissed also.

Beyfus K.C. and *Hon. Victor Russell* for the respondent petitioner. The point for consideration is really a matter of impression and not of authority. It is suggested that the intention of s. 178, sub-s. 2, of the Act was to provide for dismissal as between the petitioner and the respondent, the persons between whom there was collusion. If the Legislature had intended that a bona fide charge against a co-respondent should be dismissed if there was collusion between the petitioner and another co-respondent, the language of the sub-section would have been different. The mere fact that the supplemental petition is against a co-respondent who was already a party to the suit is immaterial. If the supplemental petition had related to a new co-respondent it would have contained all the details necessary for it to stand as an independent petition, but this cannot affect the legal position. It is as if there were two petitions before the Court and collusion affecting only one of them. Sect. 178, sub-s. 2, of the Act of 1925 is not inconsistent with there being a right to dismiss part only of a petition, but even if the petition as a whole had been dismissed, the supplemental petition would remain and could be the subject of entirely independent proceedings. The dismissal of a petition for collusion does not prevent the petitioner from filing a new petition in which there is no collusion : *Churchward* v. *Churchward and Holliday* (2) ;

(1) (1870) L. R. 2 P. & M. 193. (2) [1895] P. 7, 32.

and there is therefore no reason why the supplemental petition should not be dealt with on its merits: see also *Watkin* v. *Watkin and Malcolm.* (1) *Lapington* v. *Lapington* (2) has no bearing on the present case. In these circumstances the appeal ought to be dismissed.

Wallington K.C. replied.

LORD HANWORTH M.R. This is an appeal from a decision of the President of the Divorce Division. The question is one of some complexity and difficulty. It is necessary to recount the facts which gave rise to the presentation of the petition and the supplemental petition.

On March 20, 1933, the husband presented a petition alleging adultery by his wife with one Davies; and on March 22 that petition was amended by adding further particulars, such as Davies' address. On June 2 the petition was again amended: there had been a claim for 2000*l.* against Davies, but now Johnstone was added as a co-respondent and 2000*l.* was also claimed against him. On June 9 a supplemental petition was filed against Johnstone charging him with acts of adultery subsequent to the date of the original petition. On July 1 the respondent, the wife, delivered an answer denying adultery, and on July 28 Johnstone put in an answer denying adultery. On August 10 the wife amended her answer denying adultery between her and either of the co-respondents and alleging that there had been collusion between her and her husband. Davies put in no answer. On November 1 the supplemental petition was amplified by adding allegations of further acts of adultery with Johnstone at Southampton. There were therefore a petition and a supplemental petition and a charge against Davies and Johnstone, Davies putting in no answer and Johnstone denying adultery. On December 1 an order was made that the respondent's answer should be struck out. The result was that when the matter came before the Court the only party in a position to raise the issue of collusion was Johnstone.

(1) (1919) 122 L. T. 225. (2) 14 P. D. 21.

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The trial took place on March 6 and 7 of this year, and the issues before the jury were whether the co-respondent Johnstone had committed adultery with the respondent and secondly as to the amount of the damages. The President divided the first question and he put the question of adultery in two questions: first, whether Johnstone had committed adultery with the wife as alleged in the original petition up to July, 1932, and the answer of the jury to that question was "Yes." Secondly, whether adultery had been committed by Johnstone between April 10 and 13, 1933, the answer to which was "Yes." The damages given by the jury were 2500*l.*, an amount in excess of the claim. That left for the determination of the President the questions (1.) whether there had been any adultery by the wife with Davies and (2.) whether there had been any collusion as alleged in the amended answer of the wife on the presentation of the original petition between the husband and the wife, that question being raised by the Court.

I will deal first with the question of collusion raised by the cross-appeal of the husband, because, logically, that comes first. Collusion is a serious offence, and particularly so in matters coming before the Divorce Court. The original sections dealing with it are contained in the Matrimonial Causes Act, 1857, which by s. 30 provided: "In case the Court, on the evidence in relation to any such petition . . . . shall find the petitioner has during the marriage . . . . condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition." That section is reproduced in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925. Therefore, the Court under that section has a definite duty, in the cases specified, to refuse to give relief. In *Rutherford* v. *Rutherford* (1) Lord Sterndale M.R. said that ss. 29 and 30 of the Matrimonial Causes Act, 1857, meant that the Court could look at the whole of the evidence with regard to the petition and on that must determine the answer it

(1) [1922] P. 144, 154.

would give to the petition in any case where the whole matter is tried before the same judge at the same time and that whether all the parties were before the Court or not. That was approved by Lord Birkenhead in the same case on appeal to the House of Lords sub nom. *Rutherford* v. *Richardson*. (1) [His Lordship then dealt with the cross-appeal and held that there was evidence before the learned judge which justified him in holding that there had been collusion, and that the cross-appeal must therefore be dismissed. He continued :] The question then arises what was the effect of the collusion upon the petition and supplemental petition. It is clear that the President endeavoured to avoid circuity of proceedings and expense, and, in order to do so, merely dismissed the prayer of the petition and gave the petitioner relief on the supplemental petition. But if the prayer of the petition is dismissed the whole petition must be dismissed. Part of the petition cannot be dealt with separately in that way. It was, however, said that the supplemental petition still stood, proprio vigore, and gave the right to the relief asked for by the petitioner. There is no ground for such a contention. The supplemental petition cannot be severed from the petition. It is stated in the text-books that supplemental petitions are not referred to in the rules, but are governed by case law and practice. The practice is laid down in certain Directions issued in the Divorce Registry. Direction No. 69, states that : " Supplemental and amended petitions must bear the proper notice to any person not previously named. Orders giving leave to amend petition or to file a supplemental petition must, where there has been an appearance, state the time allowed for filing or amending answer " thereby treating a supplemental petition in the same way as an amended petition. Direction No. 71 provides : " An application to file a supplemental petition made prior to service of the original petition should be refused and a new petition containing all the charges should be filed "—that means that you cannot make the supplemental stand alone. And Direction No. 74 is to the same effect, making it clear that the petition and the supplemental petition are to be treated as one petition

(1) [1923] A. C. 1, 8.

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There is also no distinction made between the petition and supplemental petition in the cases. *Smith* v. *Smith* (1), where it was held that where a respondent was cited by advertisement, and leave to amend the petition was afterwards granted, the amended petition need not be advertised, shows that proceedings are based on one citation and one only. In *Schira* v. *Schira and Sampajo* (2) it was held that where a husband petitioned for dissolution of marriage on the ground of his wife's adultery, and she in her answer prayed for a judicial separation on the ground of desertion, the Court would not at the husband's instance (the wife opposing) terminate the suit by dismissing the petition. That was once more going back to the root—namely, the original petition.

Borham v. *Borham and Brown* (3) and *Lapington* v. *Lapington* (4) are also authorities for that view.

The result is that it is impossible to hold that a supplemental petition is anything more than a part of and an amendment to the original petition, and stands by virtue of the original citation on which the original petition was founded. The supplemental petition and original petition accordingly cannot be severed for the purposes of granting relief. The petition in this case comes on as a petition amended and supplemented, and as the petitioner has been found to be guilty of collusion, the result is that the whole of the original petition as amended and supplemental petition must be dismissed.

The appeal of the co-respondent Johnstone must therefore be allowed. The damages awarded are large, but no doubt the jury were influenced by the fact that in spite of Johnstone's letter promising never to see the wife again he nevertheless again lived in adultery with her against the honour of his own written word. This Court therefore throws no doubt and raises no question as to the amount of the damages awarded. The appeal will be allowed with costs and the petition, and with it the supplemental petition, will be dismissed. The verdict against Johnstone for damages cannot therefore

(1) 3 Sw. & Tr. 216.
(2) L. R. 1 P. & M. 466.
(3) L. R. 2 P. & M. 193.
(4) 14 P. D. 21.

stand. No variation should be made in the order as to the costs of the proceedings before the President except that so much of it as orders the co-respondent Johnstone to pay the costs of the supplemental petition must be discharged.

SLESSER L.J. In this case the learned President has found that the petition of March of 1933 was prosecuted in collusion with the respondent, and so far as that petition is concerned he has exercised the duty imposed upon him under s. 178 of the Judicature (Consolidation) Act, 1925, and has dismissed the petition. In April, 1933, however, a supplemental petition was entered by the petitioner alleging further acts of adultery on the part of the respondent which extended from April 10 to April 15, 1933. In respect of that supplemental petition there is no finding of collusion, and the learned judge has found himself able to give damages against the co-respondent in respect of the adulteries alleged in that supplemental petition. He has gone further and increased the damages sought in the supplemental petition by amendment by incorporating in them some of the damages claimed in respect of the matters which strictly were within the ambit of the original petition.

The primary question of law in this case is whether the learned judge was right, having found that there was collusion in the presentation and prosecution of the petition, in holding that that wrong did not in fact make void the supplemental petition, so that he ought to have dismissed the supplemental petition too. There appears to be no doubt that if an altogether new petition is presented, a finding of collusion in an earlier petition will not necessarily disqualify the later and independent petition, and this Court has to consider what is the legal position of what has been called in the directions and in the authorities a supplemental petition. The words " supplemental petition " find no place either in the Judicature Act, 1925, s. 178, or in its ancestor, ss. 29 and 30 of the Matrimonial Causes Act, 1857. Therefore, when we read the words " the petition " in the statute, which requires a petition to be dismissed where collusion is proved, we

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are not told by the statute itself whether those words "the petition" do or do not include a supplemental petition. That is the question which we have here to decide.

The purpose of a supplemental petition is apparent when once the history of the matter is considered. It is a general rule at the common law that matters which arise subsequently to the issuing of a writ cannot be pleaded in that particular action, but in the Ecclesiastical Courts, before the passing of the Act of 1857, it was otherwise. The question arose in *Webb* v. *Webb*. (1) There, after the citation, the mover for the citation discovered misconduct which was subsequent in date to the date of the citation, and the question arose whether such additional evidence was or was not properly includable in the subject-matter of the libel following upon the citation. Dr. Lushington said: "It has been correctly stated, that the practice of the Ecclesiastical Court is to allow facts of adultery, that may have come to the knowledge of a party even after publication"—that is publication of the libel—"to be pleaded," and he did permit the additional plea; but I cite that case as showing that at that time the additional plea was regarded as a part of and incorporated in the original libel and was by no means a separate suit. That was the position under the old ecclesiastical law.

The matter next came up in 1870 in *Borham* v. *Borham and Brown*. (2) The question which was raised in that case was: notwithstanding the ecclesiastical practice, whether the language of s. 30 of the Act of 1857, which says that "in case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed"—that is, alleged before the time of the petition, because of course under the Act of 1857 the old system of citation and libel was done away with and the petition was substituted—whether the new words in s. 30, dealing with petition and not with citation and libel, did not have the effect of precluding the Court from going into matters which had arisen subsequently to the publication of the petition. What

(1) 1 Hag. Ecc. 349. (2) L.R. 2 P. & M. 193.

the learned Judge Ordinary said in that case was this (1): "I think, therefore, that acts of adultery subsequent to the date of the petition cannot properly be taken into consideration at the hearing of the petition itself; and that if a judgment for a dissolution be founded on such subsequent acts, the whole proceeding would be held by a court of appeal to be erroneous. I am willing, however, if the petitioner desires it, to allow the amendment to be made, or he may file a fresh petition. If he determines to commence a new proceeding the question of costs will be reserved," and so forth; then on the application of counsel leave was given to the petitioner to file a supplemental petition, setting out the acts of adultery alleged to be committed subsequently to the filing of the original petition. It is clear that no real change in the substance of dealing with these matters had taken place by reason of the Act of 1857. By the words there used, as the Judge Ordinary points out, it became necessary to put in a further petition, but the practice of the Court to receive evidence of acts of adultery subsequent to the original petition or the original citation remained unaltered.

Finally, in *Lapington* v. *Lapington* (2), to which my Lord drew attention, Butt J. gave expression to the same view, when he said he could not see the difference (and I think the learned judge meant a difference in principle) between amending a petition by adding new parties and filing a supplemental petition, and he contrasts those two methods on the one hand with proceedings by a fresh suit on the other. A supplemental petition is thus merely a method of dealing with evidence which has arisen since the presentation of the petition, and is in no sense a new suit. Applying that conclusion to s. 178 of the Judicature (Consolidation) Act, 1925, dealing with collusion, when the section speaks of a petition to be dismissed by reason of collusion, it must be taken to include any supplemental matters by way of evidence added to that petition. I think the learned judge was wrong when he came to the conclusion that he could treat a supplemental petition as a separate and independent suit.

(1) L. R. 2 P. & M. 193, 195. (2) 14 P. D. 21.

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That conclusion decides this case in favour of the appellant, because collusion having been found, the collusion covers not only the petition but the supplemental petition, so that the whole matter fails and is of no effect.

Finally I would say a word as to the cross-appeal. [His Lordship then dealt with the cross-appeal.]

The result of the whole matter is this: all the parties in this case stand completely devoid of merits. The husband has been found guilty of collusion. The wife has participated in that collusion, and the co-respondent also is not a person of whom any strong approval can be expressed—in fact, rather a strong disapproval. But we have to administer the law as we find it, and the result of it all is that there is collusion which voids the petition and the supplemental petition. It follows that the petitioner by reason of this collusion was not entitled to recover any damages and that the appeal succeeds, the cross-appeal fails, and the order for costs must be as stated by my Lord.

ROMER L.J. I agree. [His Lordship then dealt with the cross-appeal as to collusion, and continued:] Having found that there was collusion in the presentation of the original petition the learned judge was bound to dismiss that petition, because I cannot agree with the argument of Mr. Beyfus that the word "petition" in s. 178, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, means part of the petition. It means the whole petition. I confess I arrive at that conclusion with some regret, because it appears to be admitted by everybody that, if at the time when the petitioner amended his original petition by adding Johnstone as co-respondent and alleging adultery between his wife and Johnstone, he had, instead of pursuing that course, withdrawn the original petition altogether and had started new proceedings against his wife and Johnstone alone, he would have been entitled in the circumstances to have obtained a decree. Unfortunately, instead of pursuing that course, he chose to amend the petition, and thereupon the petition necessarily fails.

The only remaining point is whether the learned President was right in treating the supplemental petition as a different proceeding unaffected by the taint which he found attached to the original petition. As regards supplemental petitions, there is not very much to be found out. I gather from a note in a text-book that supplemental petitions are not referred to in the Divorce Rules, but are governed by practice and case law. In order, therefore, to discover the true nature of a supplemental petition, we must have regard to the practice in the Divorce Court and to such authorities as happen to be reported upon that practice. I do not propose myself to go through the directions that have been given from time to time by the learned Presidents in relation to the practice, nor to refer again to the authorities to which one or other of my Lords has already referred; I content myself with saying that for the reasons they have given I cannot find that a supplemental petition is a separate proceeding from the original petition and can be dealt with in the way in which the President has dealt with it in the present case. I agree that the order which the Master of the Rolls has indicated must be made.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for appellant on main appeal: *Bulcraig & Davis.*
Solicitors for appellant on cross-appeal: *Beyfus & Beyfus.*

W. I. C.

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May 4, 14.

LINDSAY *v.* LINDSAY.

Divorce—Practice—Pleading—Maintenance Proceedings—Conduct of parties—Finding of fact on Issue in cause—Paternity of child of the marriage—Order for custody in Decree Nisi—Res judicata—Supreme Court of Judicature (Consolidation) Act (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1, *s.* 193, *sub-s.* 1—*Rules of Supreme Court Order* XIX., *rr.* 13, 17, 19—*Matrimonial Causes Rules*, 1924, *rr.* 21, 22 (*A*) *App. No.* VI., 97.

Though it is essential, as laid down in *Restall* v. *Restall* [1930] P. 189, that in assessing maintenance for the wife the Court should have before it all relevant evidence of the conduct of the parties before and after marriage, this rule does not allow the reopening of an issue of fact already determined in proceedings for dissolution of marriage and consequently res judicata.

A petition for maintenance, though a proceeding distinct from a petition for dissolution, can nevertheless be proceeded with only as incidental to a petition for dissolution, and when the paternity of a child has not been disputed and has been established by a substantive order for its custody in a decree nisi, the paternity becomes res judicata and cannot be assailed in maintenance proceedings which follow. The rules of pleading laid down by R. S. C., Order XIX., rr. 13, 17, 19, are imported into pleadings in matrimonial causes by the Matrimonial Causes Rules, 1924, r. 97, and any material fact not denied is to be treated as admitted.

Quaere whether the principle laid down in *Mould* v. *Mould* [1933] P. 76, that matters not pleaded in answer to a petition for dissolution though possible defences to it can be relied on in answer to maintenance proceedings, necessarily follows from the decision in *Restall* v. *Restall* [1930] P. 189.

SUMMONS by the husband John Maitland Lindsay, respondent to the petition of the wife Frances Bertha Orlebar Lindsay for maintenance, for leave to file affidavit evidence putting in issue the paternity of a female child alleged by the wife to be a child of the marriage.

The parties were married on January 17, 1920, and the child in question was born on November 21, 1927, and about this time the parties separated. On July 17, 1930, the wife filed a petition for a judicial separation alleging desertion and also that the child was a child of the marriage and praying for its custody. By his answer to this petition the husband denied the desertion but did not suggest any dispute as to the paternity of the child. On February 6, 1931, the wife filed a supplemental petition alleging the adultery of the husband, praying for the dissolution of the marriage, and seeking the

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exercise by the Court of its discretion in her favour, she having committed adultery on a single occasion in 1927, and again praying for the custody of the child. The husband filed no answer to this petition.

On July 1, 1931, a decree nisi was pronounced for the dissolution of the marriage of the parties, and in the ordinary form the decree gave to the wife (the petitioner) the custody of the child. On October 5, 1931, the wife filed her petition for maintenance reciting that she had been given the custody of the only child of the marriage. On January 15, 1932, a decree absolute was pronounced dissolving the marriage. The maintenance proceedings continued, and the husband took out the present (Registrar's) summons dated July 31, 1933, for leave to read at the hearing of the petition for maintenance affidavits by various deponents showing that the child was not that of the husband, with the object of reducing the amount of maintenance to be ordered, and further of bringing forward the "conduct" of the wife as a material matter in allotting support to her within the meaning of the Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1. The summons was referred to a judge (Sir Boyd Merriman, the President), by whom it was adjourned into Court for argument on questions of law arising.

R. F. Bayford K.C. (*A. Richard Ellis* with him) in support of the summons. The case for the wife must be that the husband is estopped by judgment from raising the questions which the affidavits in question support, i.e., the illegitimacy of the child. The maintenance petition, however, is a separate proceeding. It not only involves the examination of the joint incomes, but on its investigation the Court is directed by the statute (the Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1), to take into consideration the conduct of the parties, and for this purpose it is essential that it should have before it all relevant matters: *Restall* v. *Restall.* (1)

The decree nisi which has given the wife the custody of the child as the child of the marriage is merely a step in a lis

(1) [1930] P. 189.

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pendens. It is not res judicata and is no bar to a final decision on the merits: *The Delta.* (1) The status of the parties had not been finally determined by the decree absolute at the time when the maintenance proceedings were instituted. It was immaterial then to the husband that the wife should obtain the custody of a child whose legitimacy he was disputing, and he now has a statutory right to have her conduct inquired into in the course of the maintenance proceedings.

Clifford Mortimer for the wife. This is a clear case of estoppel. It is not contended that the conduct of the parties is immaterial in maintenance proceedings, but the evidence which it is now sought to adduce does not bear on conduct; it is solely directed to the legitimacy of the child. The allegation that the child was a child of the marriage was one of substance and not traversed in the answers to either the original or the supplemental petitions. Rule 97, Matrimonial Causes Rules, 1924, throws the rule of pleading back to R. S. C., Order XIX., rr. 13, 17, 19. The power of the Court to make orders for custody is derived from the Judicature (Consolidation) Act, 1925, s. 193, sub-s. 1, which defines a child, the custody of which is claimed, as being one "the marriage of whose parents is the subject of the proceedings," *Green* v. *Green* (2), and the decree nisi in this case, in the common form, orders the child, "issue of the marriage between the petitioner and the respondent" to remain in the custody of the petitioner. The respondent if dissatisfied with this portion of the decree could have appealed against it, in the absence of any jurisdiction to order custody of a child not being issue of the marriage of the parties. The law of estoppel is fully applicable to the matrimonial Court and to findings in its decrees and to their effect inter partes: *Woodland* v. *Woodland.* (3)

A. Richard Ellis in reply. The maintenance petition is a proceeding separate and distinct from the original petitions, and the respondent is not estopped from contesting the legitimacy of the child by not having raised it under the original petition: *Mould* v. *Mould.* (4)

(1) (1876) 1 P. D. 393, 404.
(2) [1929] P. 101, 104.
(3) [1928] P. 169, 172.
(4) [1933] P. 76.

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The status of the child was purely incidental or collateral to the matter of the original petitions; consequently the failure of the husband to raise it then does not debar him now. It is not a case of res judicata and the respondent is not within the mischief of that principle. [He referred to *Ord* v. *Ord* (1) and the *Duchess of Kingston's Case.* (2)].

F. S. H. Bryant for the child.

Cur. adv. vult.

May 14. THE PRESIDENT (SIR BOYD MERRIMAN) [after stating the facts:] Counsel for the wife admits that her conduct is a material element for consideration but submits that, as between the spouses, the paternity and legitimacy of the child is res judicata, and that the husband is absolutely precluded from putting before the Court on the issue of maintenance any evidence directed to establish that he is not the father of the child. The actual point of conflict between these two considerations will be seen when I add to the facts already stated the further matter that in her statement in support of her prayer for discretion, the wife admits a single act of adultery with a named man, in the course of a voyage to rejoin her husband at Cape Town, which voyage began in February and ended in March, 1927; that she confessed this adultery to her husband, but that they continued to live together; and that the child was born on November 21, 1927. It is obvious, therefore, that this admission would support the suggestion that the other man was the father of the child, while not being inconsistent with the husband being the father. It is not contested that any evidence connected with the wife's adultery is admissible, and I so hold; the objection is to the admission of any evidence directed solely to the question of paternity.

Counsel for the husband argues that a maintenance petition is a wholly separate proceeding from the petition for dissolution, raising separate issues and leading to a separate judgment. The issues on this petition, he says, are the respective incomes

(1) [1923] 2 K. B. 432. (2) 2 Smith's L. C. (13th ed.), 644.

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of the spouses and the conduct of the parties in all respects that might be relevant to the decision whether any, and what, maintenance should be awarded. On the other hand, he says that an order for the custody of the child, made upon the main petition, does not operate as an estoppel, as there was no need for the husband to object to the wife being given the custody of a child of which he knew that he was not the father. If necessary, he would be prepared to support this contention, even if the order for custody were contained in the decree absolute ; but he points out that in this case it is contained in the decree nisi and that the maintenance petition was filed before the decree absolute. He contends, therefore, that at the material time there was only an order for custody in a pending suit, and this does not amount to res judicata : *The Delta.* (1)

Now it is quite clearly laid down by the Court of Appeal in *Restall* v. *Restall* (2) that in exercising its discretion as to the amount of maintenance it is essential that the Court should have before it all the relevant evidence of the conduct of the parties both before and after the marriage. It is obvious that evidence that the wife has given birth to another man's child during the marriage is, of itself, relevant evidence of conduct, if the evidence is in the circumstances admissible. In *Mould* v. *Mould* (3) Bateson J. held that the rule laid down in *Restall* v. *Restall* (2) extended to maintenance proceedings in a case of dissolution of marriage in which there had been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer to the original petition, if pleaded. Speaking for myself, I should desire to consider the matter further before holding that that result followed from the decision in *Restall* v. *Restall.* (2) I would point out that that was a nullity suit based upon the consanguinity of the parties. It is manifest, therefore, that misconduct on the part of the petitioner would not of itself have afforded any answer ; and in fact no question of estoppel arose in that case.

(1) 1 P. D. 393, 404. (2) [1930] P. 189.
(3) [1933] P. 76.

In considering the doctrine of res judicata, the distinction is to be borne in mind between a case in which a party who has had an opportunity of proving a fact in support of his claim or defence, and has not chosen to rely on it, is afterwards precluded from putting that fact before any tribunal, and a case in which the very fact itself has been judicially determined. The principles relating to both these classes of case are fully dealt with in the judgment of Lush J. in *Ord* v. *Ord*. (1)

The present case is, indeed, one of the former class, inasmuch as the respondent deliberately abstained from putting in issue the paternity of the child in his answer to the wife's original petition, and made no answer to the supplemental petition. Although the Matrimonial Causes Rules, 1924, do not deal in terms with the effect of the failure of a respondent to deny specific allegations in the petition, as is the case in Order XIX., rr. 13, 17, and 19, of the Rules of the Supreme Court, I think that it is plain that Matrimonial Causes Rules, 1924, rr. 21 and 22 (*a*), coupled with the form of answer given in Appendix No. VI,. have the same effect. The specimen form indicates that the matrimonial offence charged should be specifically denied ; that any counter-charge should be pleaded, and there is this note : " In like manner respondent is to state connivance, condonation or other matters relied on as a ground for dismissing the petition." I have no doubt, as I was assured is the case, that the practice of this Court is to treat as being admitted any material fact alleged in the petition which is not expressly stated in the answer to be denied or not to be admitted.

As I have already said, if the matter depended solely on this branch of the doctrine of res judicata, I should have wished to consider further whether, as was held by Bateson J. in *Mould* v. *Mould* (2), there is anything in the decision in *Restall* v. *Restall* (3) which obliges this Court to receive on a maintenance petition evidence of facts which would have afforded a defence to the petition for divorce, but which the respondent spouse deliberately refrained from raising in

(1) [1923] 2 K. B. 432. (2) [1933] P. 76.
(3) [1930] P. 189.

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answer to that petition. But, in my opinion, however the matter might stand on a mere failure by the respondent to raise the issue when he had the opportunity of doing so, this is essentially one of the class of cases in which, as between these parties, a fact " directly in issue in the case has actually been decided by the Court and appears from the judgment itself to be the ground on which it was based " ; to use the words taken from Sir James Stephen's Digest of Evidence, which was quoted by Lush J. in *Ord* v. *Ord* (1), already referred to. I do not think that this is merely a case of a matter coming collaterally in question, or of a matter incidentally cognizable, or of a matter to be inferred by argument from the judgment : see *Duchess of Kingston's Case* (2) and the passage from the judgment of Knight Bruce V.-C. in *Barrs* v. *Jackson* (3), cited by Lush J. in *Ord* v. *Ord.* (4).

Agreeing, as I do, with the decision of Bateson J. (2) in *Mould* v. *Mould* that a petition for maintenance is a proceeding separate and distinct from the original petition for dissolution, I think, nevertheless, that it clearly appears from s. 190, sub-s. 1, of the Judicature (Consolidation) Act, 1925, that the petition for maintenance is dependent on the pronouncement of a decree for divorce or nullity of marriage. In other words, this particular petition can only be brought as incidental to the matrimonial suit between the same parties. Sect. 193, sub-s. 1, lays down that in any proceeding for divorce the Court may make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings ; and that it may do so from time to time, either before or by, or after the final decree. It thus appears that the jurisdiction of the Court both with regard to custody and maintenance of children is limited to children the marriage of whose parents is the subject of the proceedings. It is, of course, for this reason that the wife's original petition in this suit contains, as is invariably the case, the allegation as to the child of the

(1) [1923] 2 K. B. 432, 440, 441.
(2) 2 Smith's L. C. (13th ed.), 644.
(3) (1842) 1 Y. & C. C. C. 585, 597.
(4) [1923] 2 K. B. 432, 441.

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marriage, which I have already quoted. I now turn back to the decree nisi. Counsel for the Respondent says that this is merely an interim or inchoate order depending for its effect on the pronouncement of a decree absolute. It is true that if for any reason, such as a successful intervention by the King's Proctor, the decree nisi were rescinded, an order for custody made on the decree nisi would go with the rest. This seems to me necessarily to follow by virtue of s. 193, sub-s. 1, from the dismissal of the petition. In no other sense, however, is the order for custody dependent upon the decree absolute. By s. 183, sub-s. 1, of the Act it is laid down that a decree for divorce shall, in the first instance, be a decree nisi, not to be made absolute until after the expiration of six months ; but, as I have already pointed out, s. 193, sub-s. 1, enables the Court to make an order for the custody or maintenance of the children, either before, or by, or after, the final decree in the suit itself. In this case, in accordance with the section and following the general practice, the Court, by the decree nisi, decreed that the marriage be dissolved " by reason that since the celebration thereof the respondent has been guilty of adultery unless sufficient cause be shown to the Court why this decree should not be made absolute within six months from the making thereof," and ordered that the child (naming her), " issue of the marriage between the petitioner and the respondent, do remain in the custody of the petitioner until further order of the Court, and it is directed that such child be not removed out of the jurisdiction of the Court without its sanction." The decree absolute refers to the terms of the decree nisi and concludes with the words : " and no such cause having been shown, the Court, by application of the said petitioner by final decree pronounced and declared the said marriage to be dissolved." There is no reference whatever in the decree absolute to the order for the custody of the child. Thus it appears that the order for custody in the decree nisi is the substantive order, and that it precedes the petition for maintenance. The fact that the child is issue of the marriage between the petitioner and the respondent is the fact directly in issue, is actually decided and appears from the judgment itself to be the

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ground on which it was based, as must necessarily be the case if the Court is to make the order.

In these circumstances, I am of opinion that, whatever the truth may be about the paternity of this child, the respondent to this petition is precluded from averring that he is not the father. I am fortified in this conclusion by the decision in *Green* v. *Green* (1), where Lord Merrivale says: "An order for custody in a divorce suit—for reasons which I will presently point out—implies a finding of legitimacy"; and by the decision of Hill J. in *Woodland* v. *Woodland* (2), where it was held that a decree for restitution of conjugal rights containing the usual finding that the parties to the suit were husband and wife, precluded the husband in a subsequent petition for nullity from alleging that the marriage was bigamous, owing to the wife having a husband living at the time when it was celebrated. Hill J. says: "The marriage was directly in issue in the proceedings for restitution. It was actually decided by the Court, and the Court could not have made a decree without finding that it was a valid marriage. It appears from the judgment itself to be the ground upon which it was based; there was a finding that they were lawful husband and wife."

I therefore decline to allow the husband to file any evidence on this petition directed to disprove his paternity, and dismiss the summons with costs.

Solicitors: *Tyrrell Lewis & Co.; G. H. Drury.*

(1) [1929] P. 101, 104. (2) [1928] P. 169, 173.

R. M. M.

THE BAARN (No. 2).

C. A.
1934
June 6, 7.

Shipping—Collision—Damage to Chilean vessel—Action in Rem—Bail—Admission of liability—Consent to Reference—Vessel repaired in Chile—Items of claim in Chilean currency—"Payment" in Chile in Chilean currency—Fall in exchange values—Invalidity of payment according to English law.

A Chilean vessel owned by the plaintiffs received damage through being run into by a Dutch vessel owned by the defendants. The Dutch vessel was arrested in England, and her owners put in bail, admitted liability, and consented to a reference to assess the damages. The admission and consent were filed in the registry and became an Order of Court. The Chilean vessel was repaired in Chile, and the plaintiffs filed their claim and vouchers comprising (inter alia) some 70,000 Chilean pesos in respect of repairs and detention, quantified into sterling for the purposes of the claim at a little over 1500*l.*

The defendants alleged that under Chilean law a debtor could make a valid payment, even against the will of the creditor, by depositing the amount owed in a Chilean bank in the name of the creditor, and, the exchange value of the peso having fallen, the defendants deposited in a bank in Chile 80,000 pesos in the plaintiffs' name, an amount which the defendants alleged was sufficient to cover the whole claim with interest.

Langton J. held that the deposit, so far as it related to the claim in respect of repairs and detention, was a good discharge, and that the reference in respect of these items must be stayed: (1932) 49 Times L. R. 132.

On appeal [1933] P. 251 Scrutton and Romer L.JJ. held that the deposit was not a good payment in satisfaction of the damages and that the reference must proceed; but Greer L.J. said that in his opinion the registrar should treat the deposit as a payment on account of the sums expended and lost in pesos. (1)

The damages in question were agreed at 1581*l.*, and it was further agreed at the reference (*a*) that the deposit, on the rate of exchange applicable at the time the pesos were expended and lost, was equivalent to 1409*l.* 3*s.* 11*d.*, but (*b*), that owing to the action of the Chilean Exchange Control Commission it was impossible to purchase sterling, and (*c*) that the defendants could at any time obtain possession of the pesos from the bank in Chile and that the plaintiffs did not claim them. The registrar held that a foreign defendant sued for damages in this country could not satisfy the claim by offering to pay in foreign currency; that the deposit did not affect the proceedings instituted here; and that the plaintiffs were entitled to 1581*l.* and interest. The defendants moved in objection to the report.

(1) NOTE.—In the headnote to *The Baarn* [1933] P. 251 the opinion of Greer L.J. was erroneously stated to be that of the Court. The majority of the Court, however, as appears from the present headnote, were of opinion that the deposit was not to be treated as a payment in respect of the claim in this country.

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Bateson J. confirmed the report, not only for the reasons given by the registrar, but also because, on the view he took of the judgments of Scrutton and Romer L.JJ., the question whether the deposit could be taken into account had already been decided. The defendants appealed:—

Held, that the appeal failed; (per Curiam) on the ground that on the previous judgments of the majority of the Court of Appeal the defendants were precluded from raising the question that the deposit was to be treated as a sum paid on account of the damages in this country; (per Scrutton and Maugham L.JJ.) on the additional ground that a deposit which could not be converted into sterling could not satisfy or reduce damages payable in sterling; (per Maugham L.J.) on the ground that procedure in an action brought in this country must be governed by the lex fori and that the deposit in pesos was not a valid payment according to English law.

The Baarn [1933] P. 251 further considered and explained.

APPEAL from a decision of Bateson J. confirming a report of the registrar on a reference to assess damages.

The circumstances under which the case was referred to the registrar are sufficiently summarized in the headnote and more fully set out in the judgments.

In his report the registrar, after setting out the facts, said: "The only question before me on the reference was whether the sum of 80,761.02 pesos deposited in the bank in Chile was to be treated as a sum paid on account of the damage. The defendants submitted that the proper rate of exchange was 57.31 pesos to the £, that the deposit made was equivalent to the payment of 1409*l.* 3*s.* 11*d.*, and that all the plaintiffs were entitled to was a judgment for the difference between that sum and 1581*l.*, the agreed damage, viz., 172*l.* 16*s.* 1*d.* No evidence was called, but it was agreed by counsel that there was in Chile an Exchange Control Commission, that from a date before 27 June, 1932, until the present time it was impossible to purchase foreign currencies in Chile with pesos unless the permission of the Commission was obtained, that that permission was unobtainable, and that the only use to which the pesos could be put was to purchase commodities in Chile. If the owners of the *Baarn* had not entered an appearance the plaintiffs could have had the vessel sold . . . . and when, as a result of the undertaking to appear and put in bail, bail was given in the sum of 3750*l.* the

plaintiffs were assured of having their damages paid in sterling. Instead of tendering a sum in sterling the defendants offered the plaintiffs a sum in pesos in Chile to satisfy the claim. Such a deposit is not equivalent to a payment into Court and in my view cannot affect the proceedings properly instituted against the defendants in this country."

"No injustice will be done to the defendants in refusing to give them credit for the pesos offered to the plaintiffs in Chile, and the defendants admittedly can at any time obtain possession of them from the bank in Chile and the plaintiffs do not claim them. The result is that the plaintiffs are entitled to be paid the sum of 1581*l.*, with interest."

The defendants appealed.

BATESON J. said that he agreed with the report of the registrar, but he also thought that the decision of the Court of Appeal (1) concluded the question. His Lordship stated the facts and continued as follows: "The defendants contend that having deposited 80,000 dollars—which if they could be converted into sterling would produce 1409*l.* 3*s.* 11*d.* on the rate for converting pounds into pesos or dollars—that is a payment pro tanto of the amount found by the registrar, and, therefore, the registrar ought to have deducted the 1409*l.* 3*s.* 11*d.* from his figure of 1581*l.*, leaving a balance of 172*l.* 16*s.* 1*d.* only to be given judgment for. . . . . I do not think that is right, and for this reason, that although with 1409*l.* 3*s.* 11*d.* one may be able to buy 80,000 Chilean dollars, one cannot now with 80,000 pesos buy 1409*l.* 3*s.* 11*d.* because of the freezing of the credits in Chile. Dollars are of no use, in Chile, to buy sterling; and in my view it is no good trying to satisfy a judgment, wholly or partially, by depositing pesos in a foreign bank from which it is possible for the plaintiffs to take them out if they like. It cannot be regarded as a tender or a payment on account in this country, or a payment towards the liquidation of the sum which the registrar may find due. I do not think that this payment—

(1) [1933] P. 251.

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if it be really a payment on account to the plaintiffs in Chile —can be taken into consideration at all."

"The claim is for damages in respect of a collision—unliquidated damages in this country—and a claim in sterling. The defendants gave an undertaking to appear and put in bail in sterling. The judgment of the Court must be in sterling, and to offer the plaintiffs something which perhaps can be converted into sterling at some period in the remote future, but which cannot now be converted into sterling, is, it seems to me, to be offering them nothing at all."

His Lordship then referred in detail to passages in the decisions of the Court of Appeal, and said that it was contended by the defendants that the judgment, and more especially the decision of Greer L.J., was binding in their favour. "It is admitted, however," said his Lordship, "that if I take the decision of Romer L.J. they are out of Court; and if I say that I think Scrutton L.J. is also a supporter of Romer L.J. it puts them further out of Court." As regards the judgment of Greer L.J., who took the view that the deposit in the Chilean bank was a payment on account, his Lordship said that he thought that what the learned Lord Justice was speaking of was "a payment by itself equivalent in value to sterling. Here, these pesos are in no sense the equivalent of what is being awarded by the English Court . . . . so that I do not think that even the judgment of Greer L.J. is good enough to support the defendants' argument. That means that the motion fails and the report will be confirmed."

The defendants appealed.

H. U. Willink for the appellants. Bateson J. was wrong in holding that the previous decision of the Court of Appeal concluded the matter. There is nothing in the registrar's report to lead to this conclusion. The registrar dealt with the case on the footing that the validity and sufficiency of the payment was still to be decided, and if the order of the Court of Appeal, as drawn up, means that the Court decided that the deposit in Chile could not be taken into account at all, it is submitted that it does not express the view of the

majority of the Court. The words used are : pronounced the payment by deposit " in satisfaction " of the items in question not to be " a good payment." None of the Lords Justices said that there had been no payment of pesos in Chile, or that if the plaintiffs had accepted the 80,000 pesos they could in addition have got the full amount in sterling in this country. The ratio decidendi of the judgment of Scrutton L.J. was that there was " no final decision by the Chilean Courts that the payment in depreciated pesos is sufficient while proceedings are pending in London," not that the payment was not to be taken into account at all ; and Greer L.J. said in terms that he thought the deposit should be taken into account. According to Chilean law—which is a question of fact—the procedure adopted by the defendants amounted at least to part payment, and that evidence is admissible in considering the assessment of unliquidated damages here. The plaintiffs set out in their claim that they had lost and disbursed pesos in Chile, and it cannot be irrelevant that pesos have been deposited in a bank in Chile in their name to reimburse them. They contested the order of the Chilean Court and lost the appeal ; obviously, therefore, it must have been held that the offer was made in the proper country. The deposit was made in respect of the claim, and the judgment to be given in sterling should pro tanto have been reduced. The limitation on transfer that the Exchange Commission had imposed is immaterial, for the parties had agreed on a rate of exchange, and the pesos would have been expended in Chile. [Reference was made to *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (1); *The Volturno* (2); and *de Beeche* v. *South American Stores* (*Gath and Chaves*), *Ld.* (3)]

R. F. Hayward for the respondents was not called on.

SCRUTTON L.J. In my opinion this appeal fails. Certain Chilean shipowners have obtained a judgment in the English Courts for damages caused to their ship by a collision with a Dutch ship, the defendants being the Dutch owners. That

(1) [1922] 1 K. B. 451.
(2) [1921] 2 A. C. 544.
(3) (1933) Not reported. C. A. Nov. 29.

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has resulted in a judgment against the defendants expressed in sterling. The point in dispute is whether the defendants can reduce the amount they have to pay by bringing into account a sum that, under Chilean law, they have deposited in a bank in Chile, it being alleged that by Chilean law that amounts to payment of the claim for repairs by the Chilean shipowner—expenses incurred in Chilean pesos. That contention has been rejected by the registrar and by Bateson J., and I agree with the result of their decisions and with the reasons that they have given. I might stop there; but in view of the very earnest and able argument addressed to us by Mr. Willink, I think it right to shortly state the reasons why I agree with the two decisions under appeal.

This appeal is—I hope—the last chapter, but I am not sure that it is, of a history which began with the collision between the Chilean ship, the *Bio Bio*, and the Dutch ship, the *Baarn*, in the waters of Ecuador. For centuries the English Court of Admiralty has had a jurisdiction over the high seas which include, in the view of the English Admiralty, a number of territorial waters, including the waters of Ecuador. The plaintiffs had to repair their ship, which they did in their own country. They also incurred some expenses in Ecuador, some payments to the American Consul in American dollars, and some payments to some one in English pounds. They might have sued the Dutch shipowners in Holland. They might, on the other hand, under the English Admiralty procedure, arrest the *Baarn* wherever they could find her. They did find her in England, arrested her in rem, and compelled the defendants to give bail; and the defendants then admitted liability for the damages occasioned by the collision. The question then would proceed to trial in the registry to ascertain what was the amount of damage. But the defendants then made an attempt to say there should be no proceedings in the registry, because "as to the Ecuadorian currency and the United States currency and the English currency I pay you, and as to the Chilean currency I have taken certain proceedings in Chile which amount to paying you your Chilean expenditure in the currency in

which it was incurred" ; and the defendants endeavoured to put that contention before the English Courts by an application to stay proceedings in the registry, on the ground that there had been payment of the only claim left in dispute. They succeeded in persuading Langton J. that there had been payment of the Chilean expenditure ; but the learned judge made an order that the items which were not Chilean expenditure should go to the registry. Those items have passed out of the case, because they have been settled.

The plaintiffs appealed from the order of Langton J. disallowing the assessment of the items of Chilean expenditure, and this Court reversed the judgment of the learned judge. The order of the Court as drawn up is : "The Court of Appeal having heard counsel . . . . pronounced in favour of the plaintiffs' appeal . . . . and pronounced the payment by deposit made by the defendants to the plaintiffs in Chile on the 24th June, 1932, in satisfaction of items 7 to 14 of plaintiffs' claim not to be a good payment, and ordered payment of such items to be made in this country." That order was made eleven months ago, and the parties have made no attempt to vary it. But Mr. Willink has argued that it was a bad order and that it does not express the judgment which had been given by the Court eleven months ago. I think he is right to this extent : that the Court did not say anything in its judgment about ordering payment of such items to be made in this country. It seems to follow, however, when payment to the extent of 3500*l.* has been guaranteed and payment has to be obtained in respect of a judgment given in sterling, that it probably would be made in this country, the guarantor being in this country. I think, however, that the statement in the order which pronounced the payment by deposit not to be a good payment, does express the views of the majority of the Court of Appeal, and the Court of Appeal was unanimous in setting aside Langton J.'s order and ordering that the items in question should go to a reference : all three of the Lords Justices agreed in that order.

There is, however, some controversy as to what the Lords Justices meant, or as to what one of them meant. There is

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no doubt, I think, of what my brother Romer meant. He took this view: "This is a claim for damages. A sum purporting to be paid in Chile in respect of a claim of damages being considered in England is quite irrelevant; when damages are being claimed in sterling in England it is no good saying that by the law of a foreign country some payment not in sterling but in a foreign currency is a good payment of the claim in sterling." I think that is the view taken by Romer L.J. I think also there is no doubt about the view taken by my brother Greer. He said: "I think it was established by the affidavits that under the law of Chile a payment by 'consignation' is the equivalent of payment to the creditor. In my judgment the result of the evidence as to the effect of the payment according to the Chilean law is that it is a payment to the Chilean company of the number of pesos paid into the Chilean bank, but the decision of the Chilean Court does not affect the question whether the payment is sufficient to extinguish or satisfy the debt, and it has no bearing on the question as to what value in sterling the English Court in which the action in rem is pending should attribute to the payment." He points out that "the claim is not a claim for each item as a debt, but one for damages measured by the expenses and losses incurred by the owners of the ship by reason of the collision. . . . . In my judgment, treating what has happened in Chile as a payment on account, it will be the duty of the registrar to credit that payment by its equivalent value in sterling at the rate of exchange prevailing on the date when the payment was finally approved by the Chilean judge." (1) On that view my brother agreed that the order of Langton J. must be set aside, because he had stayed any proceedings before the registrar; whereas my brother Greer was of opinion that the registrar ought to go into the question, What was the value and extent of the payment in pesos—what he found to be a payment in pesos—as compared with the judgment to be given in sterling.

Unfortunately there has been some controversy as to what the third judge meant. The third judge set out in considerable

(1) [1933] P. 251, 269, 270.

detail the proceedings in the Chilean Court. The Chilean law apparently allows a debtor to say to his creditor: "I offer you money, Chilean payment. If you will not take it I will deposit it in a bank"; and it is quite clear also on the Chilean law that having deposited the money in a bank he can take it out again at any time before the creditor has accepted the money; and that mere clause makes it odd that this procedure should be considered as payment when the debtor paying can at any moment take it back from the place where it is deposited. What had happened in the Chilean proceeding was that the defendants having deposited in the Chilean bank rather more pesos than the pesos stated to have been expended in Chile by the plaintiffs—and the plaintiffs having refused to accept the money for the reason that they were claiming sterling in London, where they had arrested the ship and where the proceedings were going on—the Chilean shipowners went to the Chilean Courts and asked them to decline jurisdiction in the matter of this "consignation" because the owners of the *Baarn* "desire to take advantage of the depreciation which has occurred in our currency, so as to settle for a miserable sum losses which we suffered a year ago, and which for the most part we had to pay them in the gold currency which was then current." Thus the Chilean shipowners "asked the judge to accept their opposition to the aforesaid payment by deposit and to declare his incompetence to settle the question at issue as to whether the amount offered by the other side is or is not sufficient to discharge its debt, because this case is being ventilated by the parties before the British Courts." The judge took the view: "holding that it is not for these proceedings to deal with the request made, it is declared there is no ground for the same without prejudice to any other rights of the plaintiffs"—these Chilean shipowners. Mr. Willink's clients on this said: "If the plaintiffs still wished to discuss the sufficiency of the payment made they had a suitable means of doing so by bringing the necessary action in the ordinary Courts . . . . which is the only legal method for discussing this question." How the Dutch shipowners,

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having taken the line of there being another course open to the plaintiffs, can now say the payment was conclusive in the absence of a decision by the other Court I am quite unable to understand.

However, the third judge, having set out the whole of the Chilean records on the subject, expressed his opinion in this way: "I am of opinion, having considered the evidence, that there is no final decision by the Chilean Courts that the payment in depreciated pesos is sufficient, while proceedings are pending in London." Now I should like to say for the credit of the third judge that this was all that was necessary for him to decide to set aside Langton J.'s order, because, if there was no final decision binding and affecting the position, then the learned judge had made the wrong order in staying the proceedings in the registry. The third judge went on to say: "as I have held there was here no payment by Chilean law"—and knowing the third judge I am of the impression he meant what he said when he said that. If so, we are in the position that all the Lords Justices agreed that the order of Langton J. was wrong and that the reference in the registry must go on, but that two of the Lords Justices were of opinion that what had happened was no payment; and that is I think correctly expressed in the order and judgment of the Court. The result is that on the first point which Mr. Willink argued this Court is bound by its previous decision to say that what has happened does not amount to payment.

The second and third points as to what would be the position if the judgment already given did not bind this Court is I think disposed of by what I have already said about the bringing of proceedings which did take place in the Chilean Court; but I am content to say that I agree with the reasons given both by the registrar and by Bateson J., which show that the argument of Mr. Willink is not well founded.

There is one other matter which was not before the Court of Appeal in the previous case: namely that under Chilean law a tribunal has been established and there is a

law by which no exports of currency can be made without the consent of a certain Commission; and we had brought before us very prominently in *de Beeche* v. *South American Stores* (*Gath and Chaves*), *Ld.* (1), that that is not a mere letter, but is acted on. In that particular case there was an obligation to pay rent in sterling or sterling bills for houses in Chile; for seventeen months running the tenants of the houses applied to that Commission for leave to get sterling bills and so export pesos, and they were refused on every occasion by the Commission; and it seems clear that in this particular case, if the Chilean shipowners had taken out these pesos they could not have turned them into sterling by any process of exchange. If that be the fact, it seems extraordinary that a judgment given in England for payment of damages in sterling should be satisfied by payment of pesos in Chile against the wish of the creditors, which pesos, if they took them, they could not turn into sterling by any method.

For these reasons, agreeing as I do with the reasons stated in detail by the registrar and by Bateson J., I agree that this appeal must fail and be dismissed, with the usual consequences.

GREER L.J. I agree that this appeal should be dismissed. I cannot say that I agree with everything that has been said by Scrutton L.J. as to the reasons for dismissing the appeal; but that is immaterial, because if there is one good reason it is unnecessary to inquire whether the other reasons relied on are well founded or not.

Langton J. had before him an application to stay the reference on the ground that a large proportion of the damages which were claimed in the action in England had been paid by reason of certain transactions that took place in Chile. That involved a decision by him as to whether the deposit which was made in Chile was a payment at all, and secondly, if it was a payment, whether it could be treated as a payment in full in respect of the various items which it was alleged ought not to be considered by the registrar. If it was not a payment at all, then the order which was

(1) Unreported. C. A. Nov. 29, 1933.

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made by Langton J. was wrong. He need not have considered whether it was a sufficient payment if it was not a payment at all. There was an appeal from that decision, and the decision of this Court, though it happened to be the decision of a majority of this Court, is still the decision of the Court of Appeal; and in so far as it is recorded in the formal document, it creates an estoppel between the parties. They cannot even allege, while that judgment stands, anything that is contrary with the import of that judgment. [His Lordship read the formal judgment as drawn up.] I read that as meaning that between these parties it had been decided in the Court of Appeal that the payment by deposit in Chile was not a good payment: that is to say, was not a payment that could be treated in the action which was going on in this country as a payment by the defendants to the plaintiffs of part of the damages. If that be so, this appeal cannot succeed.

It is said that that order does not comply with what was orally stated by the Lords Justices at the hearing of the appeal. I disagree with that view. I think that both Scrutton and Romer L.JJ. held that the deposit was not to be treated as a payment in respect of the claim that was being made in the English Court; Scrutton L.J. expressly says that he came to that conclusion because he held that there was no payment by Chilean law, and therefore the English proceedings could not be stayed. I am not sure that Romer L.J. did not also hold that there was no payment by Chilean law, because in the course of his judgment he constantly refers to the alleged payment as being merely a deposit; but the main ground of his decision is that whether it was a payment in Chilean law or not, it certainly was not a payment of the claim which was being litigated in the Admiralty Division. Two of the Lords Justices having decided that there was in fact no payment, it is quite impossible for this Court now to decide that there was a payment.

For these reasons, though with some regret, because all the arguments that convinced me on the former occasion that there was a payment and that some value ought to be

attached to it still weigh in my mind, I think there is an estoppel here which prevents this appeal from succeeding. I do not think it necessary to enter into the other questions which would arise for decision. But I should say that my mind rather went with the argument which has been put forward by Mr. Willink on those other questions if they had been open.

MAUGHAM L.J. I am of the same opinion, and I agree with the judgment of Bateson J. and Scrutton L.J.

There are two matters on which I should like to say a word. First with regard to the decision of the Court of Appeal in *The Baarn*. (1) Reading that case I have come to the conclusion that the majority of the Court intended, and the recorded judgment on appeal must be taken to show that they intended, to decide that the deposit of pesos in the circumstances which have been stated was not a payment in English law which would diminish the amount of the damages payable to the plaintiffs. I will add that, having had an opportunity in the course of the able and ingenious argument presented to us of carefully considering the matter, that for my part I agree with the judgment of Romer L.J. and with his conclusion that for the reasons given the deposit, in his words, "has not . . . . any effect at all upon the plaintiffs' claim in this action." (2)

I will add a few sentences with reference to the so-called payment in Chile. That, as Scrutton L.J. has pointed out, is the deposit of pesos made pursuant to some articles of the Chilean Code, and authorized to be made by decree of the Chilean Court at Valparaiso on June 25, 1932. In considering what its effect may be, it is, I think, vital to remember that it is a payment alleged to have been made in satisfaction of a liability in this country, or at any rate in reduction of the damages which might be awarded in this country; and it is made after a judgment or order in this country, leaving to be determined in the ordinary way by the registrar the amount of the damages payable to the

(1) [1933] P. 251. (2) Ibid. 251, 274.

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plaintiffs. The payment is one which according to the Chilean law need not be one accepted by the plaintiff or other person who is alleged to be entitled to a sum of money or other property; and in fact in this case the plaintiffs declined to accept it. Under art. 1606 of the Chilean Code: "While the creditor has not accepted the deposit or where the payment has not been declared enough by the judgment of the Court, the debtor can withdraw the deposit, which consequently ceases to exist." It is not an unimportant consideration that if the creditors did accept the deposit in this case they would be unable under the existing law without the consent of a body of Commissioners to utilize the pesos which they received by changing them into English sterling or any other currency for the purposes of discharging their liabilities in other parts of the world or acquiring property in other parts of the world. In other words, we are dealing with what is popularly described as a "frozen currency."

For my part, I am unable to see that the Chilean law has anything to do with the matter before the Court. It is true that the plaintiff company has a Chilean domicil; but I am at present unable to see how that fact is relevant with regard to such an action as we are concerned with here. The vessel owned by the plaintiffs having received damage while in the territorial waters of Ecuador through being run into by a Dutch vessel, that vessel was arrested in this country; her owners were put to bail, and have admitted liability; and the action is a perfectly ordinary action in this country for the purpose of determining the amount of the damages due to the plaintiffs. The cause of action might have been assigned, but whether assigned or no, I do not know any principle of law under which an action properly brought in this country is affected in any way by the domicil that the plaintiffs happen to possess; and if it were so, it would lead to the result that the better course would be to assign the cause of action to some other person domiciled in this country. But whether in some remote way the domicil of the plaintiffs is material does not seem to me to affect the question as to

what amounts to a payment after judgment, by consent or otherwise, determining the liability of the defendants. In this country that is a most technical matter, and is not one which can be easily explained. Some of the cases which deal with the question are to be found in the decision of this Court in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings*. (1) There one sees the curious position that a debtor occupies who pays his creditor a debt post diem, which is the first thing to be considered, and then the case of a defendant paying or seeking to pay the plaintiff after action brought, and a fortiori after a judgment determining liability, that being a case where there can be no accord and satisfaction according to English law. It is well settled that the procedure in any action brought in this Court must be governed by the lex fori, and it is settled, as a reference to Dicey's Conflict of Laws, 5th ed., p. 857, will show, that if the defendant tries to set up a set-off which is not allowed by English law, the set-off is not permitted. It is obvious that if the defendant is defending on the ground of accord and satisfaction he must prove accord and satisfaction according to our procedure. The same thing must be true as regards an alleged tender; and I would add with regard to a tender that it is settled in this country that a tender after judgment determining a liability, and while a reference for assessment of damages is being held, is too late. It seems to me reasonably plain that an allegation as to a payment that has been made according to Chilean law by means of a deposit of pesos under the circumstances which I have mentioned, with the suggested result of precluding the English Court from giving judgment for a sum in sterling or reducing the amount of the judgment, is a payment which we cannot look at in any sense at all. The whole suggestion I think is ill-founded; because the amount in the circumstances I have mentioned can only be diminished by some payment which is a valid payment according to English law, and it is plain that this deposit of pesos is not such a payment.

For those reasons, in addition to those mentioned in the

(1) [1922] 1 K. B. 451.

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judgments of Bateson J. and my brother Scrutton, I am clearly of opinion that this appeal should be dismissed.

Solicitors for the appellants: *Middleton, Lewis & Clarke.*

Solicitors for the respondents: *Ince, Roscoe, Wilson & Glover.*

E. C. M. T.

1934 *April* 30.

SNOWMAN (OTHERWISE BENSINGER) *v.* SNOWMAN.

Nullity of Marriage—Incapacity to consummate—Partial and imperfect intercourse—Decree in favour of female Petitioner after a miscarriage—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 22—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 32, 103.

On a petition by a woman for nullity of marriage on the ground of the incapacity of the man to consummate it, the Court was satisfied on the evidence that the man was incapable of ordinary complete intercourse by penetration and that the woman was a virgin in spite of two miscarriages occurring during cohabitation. There was medical evidence that fecundation ab extra was possible.

Held, that the case fell within the principle laid down in *D.* v. *A.* (1), where the man was petitioner, that intercourse sufficient to establish consummation and defeat a claim for nullity on the ground of incapacity must be established to have been complete and of the normal sort and not partial or imperfect.

PETITION by a woman for nullity of marriage on the ground of the incapacity of the man to consummate it.

There was no defence to the petition.

The ceremony took place on April 8, 1930. The respondent was 30 years of age and the petitioner 20. The evidence of the petitioner was that she was willing, that there was no complete penetration but that emission took place ab extra, as the result of which she had a miscarriage. Other attempts followed on the part of the man under similar circumstances and early in March, 1933, the petitioner suffered a second miscarriage. In addition to that of the petitioner, evidence was given by a medical practitioner who attended the parties,

(1) (1845) 1 Rob. Ecc. 279, 298.

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by a gynæcological surgeon and by one of the medical inspectors of the Court. The material effect of the evidence independently of that of the petitioner was that the petitioner was a virgin with an unruptured hymen, that she had undergone the two miscarriages in question and that penetration was unnecessary for fecundation which might take place ab extra, i.e., without male penetration.

Cotes-Preedy K.C. and *H. Durley Grazebrook* for the petitioner. The important result of the evidence is that fecundation may occur without intercourse in the ordinary and complete sense of the term. The effect of legislation is to provide that the principles of the former Ecclesiastical Courts govern the Court to-day in cases of nullity. (The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22.) That section is repealed but its force and effect are re-enacted by the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 32, 103. This makes it necessary to consider what test would have been applicable to a case of the present description in the Ecclesiastical Courts. In *D.* v. *A.* (1) Dr. Lushington in the course of his judgment says, "Sexual intercourse in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet I cannot go to the length of saying, that every degree of imperfection would deprive it of its essential character. There must be degrees, difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all." This exactly covers the present case. What occurred, if it can be called intercourse, was so imperfect as scarcely to be natural. The learned judge pronounced a decree in that case against the woman who was the respondent, holding that her condition rendered carnal consummation to the full extent impossible. The condition of the man in the present case has the same result. Medical evidence was given in *Russell* v. *Russell* (2) (as stated by Lord Dunedin in his judgment in the House of Lords in that case) to the effect

(1) (1845) 1 Rob. Ecc. 279, 298. (2) [1924] A. C. 687, 722, line 5.

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that, "Fecundation ab extra is admittedly, by the medical testimony, as vouched by the learned judge (Hill J.) in his summing up, a rare, but not impossible, occurrence." This is a conclusion confirming the view of the facts presented in the present case.

BATESON J. I think that I can follow the definition given by Dr. Lushington, who in the case of *D.* v. *A.* (1) said this: "There must be degrees difficult to deal with: but if [the intercourse is] so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all." It has been proved before me in the present case that the husband was incapable of ordinary complete intercourse. I think it is established that semen might have encountered the vagina of the woman and caused a possible pregnancy without penetration or ordinary intercourse as it is properly understood. On two occasions the woman in this case has had a miscarriage. The medical evidence has satisfied me that she is a virgin and that it is well known to be possible that fecundation should take place ab extra as stated by Lord Dunedin in his judgment in *Russell* v. *Russell* (2) as a result of the evidence given in that case. Therefore, though it was possible for the woman to become impregnated as actually happened, I do not see my way to make any distinction between that which happened in the present case and the "partial and imperfect intercourse" which Dr. Lushington declined to accept as a consummation of the marriage in the case tried by him. Such a distinction if made would do away with a petitioner's right to a decree in a large number of nullity cases. There must be a decree nisi.

Solicitors: *Rhys Roberts & Co.*

(1) 1 Rob. Ecc. 279. (2) [1924] A. C. 687, 722, line 5.

R. M. M.

Applied. HESKELL *v.* CONTINENTAL EXPRESS, LTD. [1950] 1 All E.R. 1033.

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Shipping—Cargo—Short delivery of Wheat—Prepayment—Resale—Market Price—No market for wheat of particular sample—Alternative Claims in Contract and Tort—Measure of Damages.

The plaintiffs, grain merchants of Hull, in August, 1930, bought from a German firm 1000 tons of Roumanian wheat at 36*s.* a quarter, "as per sealed sample No. 727," Sept./Oct. shipment, from a Black Sea port, and immediately resold it under advance contracts at 36*s.* 6*d.* a quarter. The wheat was shipped on the defendants' steamship, but a portion of it was not put on board until November, and in consequence the German seller had to take 24*s.* a quarter for that parcel. The defendant shipowners had no knowledge of the purchase or resale prices or that the wheat had been resold.

When the ship arrived at Hull in January, 1931, it was found that there was a considerable quantity of barley mixed with the wheat; and in an action by the plaintiffs against the defendants for non-delivery and conversion Langton J. found that there was a short delivery of 47 tons and referred the assessment of the damages to the registrar.

The registrar found that there was no market for Roumanian wheat "as per sample No. 727," and that the measure of damages was the price the plaintiffs had paid for the wheat, which in fact (as an allowance of 6*d.* a quarter for defective quality had to be made) was the same price, except for the parcel bought at 24*s.*, as that at which the plaintiffs had resold it. The price of wheat generally, however, had fallen considerably between August and January, and the defendants, who contended that good Roumanian wheat equal to the sample could be bought at about 20*s.* 3*d.* a quarter, moved in objection to the registrar's report.

Bateson J. held that although, if they had received the wheat, the plaintiffs could have sold it, they could not buy any wheat answering to the sample, and that to make a market there must be power to buy as well as to sell; that there being no market, and therefore no market price, the price the plaintiffs had paid for the wheat and the price at which they had resold it afforded some evidence as to what its value was to them; that no other measure would give the plaintiffs restitutio in integrum, and that the motion in objection to the report failed. The defendants appealed:—

Held, per Greer and Maugham L.JJ. (Scrutton L.J. dissenting), that, on the following grounds, the appeal must be allowed.

(A.) That the true measure of damages was the value of the goods at the date of the non-delivery, disregarding circumstances peculiar to the plaintiffs; and that although in a proper case, if there be no market, sub-contracts might be put in evidence to show what was the value of the goods, in the present case the prices fixed by the August contracts could not be relied on as any evidence of the value in January, when the price of all wheat had fallen.

(B.) That in an action against a shipowner for non-delivery of goods, whether there is, or is not, a market for those goods at the port of

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discharge, in the absence of notice to the defendant, the law does not take into account, in order to fix the actual value to the plaintiffs, intermediate contracts entered into with a third party for the purchase or sale of the goods; and therefore, that although the plaintiffs had in fact suffered a loss of 36*s.* a quarter, they were not entitled to restitutio in integrum.

(C.) That on the alternative claim in tort for damages for conversion (as to which Maugham L.J. was not satisfied that any right of action existed) the measure of damages was the same.

(D.) That on the evidence the value of the wheat at the date of non-delivery should be taken to be 23*s.* 6*d.* a quarter.

France v. *Gaudet* (1871) L. R. 6 Q. B. 199 considered and explained.

Decision of Bateson J. [1934] W. N. 78 reversed.

APPEAL from a decision of Bateson J. confirming the report of the registrar on a reference to assess the damages for the conversion and non-delivery of some 47 tons of wheat. (1)

The plaintiffs, Spear and Thorpe, were the consignees of a parcel of Roumanian wheat shipped by the Hungarian s.s. *Arpad*, belonging to the defendants, at Galatz, for delivery at Hull. The plaintiffs had bought the wheat on August 11, 1930, from a Mr. Kampffmeyer, of Berlin, at 36*s.* a quarter, Sept./Oct. shipment, per the *Arpad*, "as per sample 727." 29·6 tons of the wheat, however, were not shipped on board the *Arpad* until November, and Mr. Kampffmeyer had to take 24*s.* 6*d.* a quarter for this portion. The wheat was a very fine sample and the plaintiffs, who had paid for it on November 27, 1930, resold the whole of it at 36*s.* 6*d.* The resales, which were by sample, had been effected on August 11 and 12. The *Arpad* arrived at Hull and failed to deliver the 47 tons as on January 10, 1931. Meanwhile the price of wheat generally had gone down considerably, variously stated as from 12*s.* to 16*s.* a quarter. The learned registrar found that there was no market price for wheat "Sample 727," and held that the measure of damages was the price the plaintiffs had paid for the wheat, less certain allowances for freight and discount. He accordingly allowed the plaintiffs, who had claimed 36*s.* 6*d.* a quarter on the whole quantity short delivered, 24*s.* 6*d.* on the 29 tons and 36*s.* on the remainder, a total sum of 272*l.* The defendants, who had

(1) [1934] W. N. 78.

contended that Danubian wheat could be bought ex store at Hull on January 10, 1931, at 20*s.* 3*d.* a quarter, and had paid 230*l.* into Court in respect of the claim, moved in objection to the report.

BATESON J. said that he agreed with the registrar that there was no market for this wheat from which the plaintiffs could supply themselves, i.e., with wheat similar to sample, Danubian or Roumanian wheat Sept./Oct. shipment. "I think," said his Lordship, "market means buyers and sellers, and where it is possible for a person to go into that market and buy what he wants or sell what he wants. If there had been any wheat of this sample to buy, the plaintiffs would have bought it and made a profit on it, as they had ready purchasers. . . . . If no market price is available for arriving at the value of the goods, the best evidence of their value is what they were sold for or what they were purchased for, as for instance the invoice price."

The defendants' argument was that all the plaintiffs could recover was the price of 47 tons of wheat which the plaintiffs could go into the market and sell, and that extraneous matters like sub-sales or the price paid for the article could not be considered. "I agree," said his Lordship, "that extraneous contracts cannot be looked at, but I do not think that is the question in this case. I think the question is, what is the value of the goods to the man who has lost them. If in fact he has sold the goods I think that may be some evidence of what their real value is."

The plaintiffs' contention (said his Lordship) was that in tort they could recover the actual value of the goods to them, and they cited *France* v. *Gaudet* (1) in support of it. They contended that this was damage which naturally flowed from the injury. To some extent he thought that they were right as regards the way the damages were to be assessed in tort, but he did not think that there was really any difference in the way the damages had to be assessed in contract, and in *France* v. *Gaudet* (1) the result seemed to him to be the same

(1) L. R. 6 Q. B. 199.

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whether the loss was caused by tort or by breach of contract. He also thought that it was good law that in a case of prepayment the market price was no criterion. There were passages in Halsbury's Laws of England, vol. 25, pp. 270–271, to that effect. "The plaintiffs," his Lordship continued, "are entitled to the value of the wheat short delivered. . . . . If there is no market value, that can only be the actual value to the plaintiffs. That is easily ascertained in this case, because the goods were paid for by the consignees and were sold by them to their buyers. There is no need to search about to find what is the measure of value, because the value of the goods is known and fixed. . . . . The plaintiffs have in fact lost 36*s*. 6*d*. which they would have got if the wheat had been delivered [less in fact 6*d*. for defective quality] or at least the price they paid for it. . . . . I think any other view than this would work injustice to the plaintiffs.

"In *Watts & Co., Ld.* v. *Mitsui & Co., Ld.* (1) Lord Dunedin stated the rule as follows: 'Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.' Here the owner can be placed more or less in the same position by having the price he paid returned to him, for he has paid it for nothing. Sometimes the principle is stated as being that the injured party is entitled to restitutio. In *The Edison* (2) Scrutton L.J. approved the view that the party who suffers loss is to be put back in integrum. . . . . It is no restitutio in integrum to give the plaintiffs wheat worth only, according to the defendants, 20*s*. to 24*s*. or 26*s*."

His Lordship accordingly held that the motion in objection to the report of the registrar failed, and he confirmed the report.

The defendants appealed. The appeal was heard on June 1, 5, 6, and judgment was given on June 29.

A. T. Miller K.C., *R. K. Chappell K.C.*, and *K. S. Carpmael* for the appellants. The measure of damages is the value of

(1) [1917] A. C. 227, 241. (2) [1932] P. 52, 67.

the wheat short delivered at the port of discharge on the date of the breach, and, even supposing that there was no market for the particular wheat, the plaintiffs could replace it with wheat of equal or even better quality at a price considerably less than either the purchase price or the sub-contract price, which was an exceptional figure due to the high price of all wheat at the time those contracts were entered into. There was certainly a sale market for this particular wheat and, accordingly, a market price, and it is unnecessary for there to be a buying market.

[SCRUTTON L.J. Is not this case very similar to *France* v. *Gaudet* (1) ?]

In that case the sub-sale was the day before the breach of the contract to deliver, and was in fact the best evidence of value. In the present case all the contracts were made months before the date of the breach, and the market price of all wheat was falling rapidly.

[SCRUTTON L.J. Both in *The Harmonides* (2) and in *The Edison* (3) the damages were based on the value to the owners of the lost ship.]

Those actions were in tort, and concerned the loss of ships engaged in profitable adventures. The sub-contracts in the present case were not in the contemplation of the parties ; the shipowners had no knowledge of the plaintiffs' contracts with third parties, which distinguishes the case from *Hall* v. *Pim* (4), where the sub-sales were in contemplation and the parties to the action were not cargo-owner and shipowner but buyer and seller.

[GREER L.J. Was there not a reasonable probability here that the wheat was bought for resale ?]

No, only a possibility ; the carrier would have no knowledge of the purpose for which the plaintiffs had bought it. In *Finlay & Co.* v. *N. V. Kwik Hoo Tong* (5) Scrutton L.J. said that sub-contracts entered into by buyers, unless contemplated by the sellers, must be disregarded for the purpose of either

(1) L. R. 6 Q. B. 199.
(2) [1903] P. 1.
(3) [1932] P. 52 ; [1933] A. C. 449.
(4) (1928) 33 Com. Cas. 324.
(5) [1929] 1 K. B. 400.

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increasing or diminishing damages ; see also *Patrick* v. *Russo-British Grain Export Co.* (1)

Even assuming that an action lies in tort as well as in contract there is no difference in principle ; the loss based on the plaintiffs' contracts with third parties does not flow directly and naturally from the wrongdoer's action, and the damages would be the same : see the observations of Scrutton and Greer L.JJ. in *The Edison* (2) : there was in law, however, no conversion but merely short delivery, and the action only lies in contract. It is not always possible to give the injured party restitutio in integrum : see *Hadley* v. *Baxendale.* (3)

[GREER L.J. referred to *The Argentino.* (4)]

Loss of a charter due to detention during repairs stands on a different footing ; the wrongdoer knows that if he runs down a vessel she may well be engaged in profitable voyages. In *Rodocanachi, Sons & Co.* v. *Milburn Bros.* (5) the sub-sales were at a lower price than the value of the goods at the time of non-delivery, and there could not have been any market in which the specific goods could have been bought, yet the selling value of the goods, i.e., more than the plaintiffs had lost, was held to be the measure of damages. Lord Esher said that the law does not take into account in an action for non-delivery of goods an intermediate contract for the purchase or sale of the goods. That is much nearer the present case : see also *Williams Bros.* v. *Agius, Ld.* (6), in which the principles laid down in *Rodocanachi, Sons & Co.* v. *Milburn Bros.* (5) were approved. No doubt, as is stated in Mayne on Damages, 10th ed., p. 17, if goods cannot be replaced for want of a market, the contract price, if there has been a contract to resell, " will be evidence of their value " ; but it will merely be evidence, and in the present case contracts made five months before the material date and on a rapidly falling market are of no value at all. In *Hinde* v. *Liddell* (7), which followed *Borries* v. *Hutchinson* (8), the plaintiffs, doing the

(1) [1927] 2 K. B. 535.
(2) [1932] P. 52, 61, 68.
(3) (1854) 9 Ex. 341.
(4) (1888) 13 P. D. 191 ; (1889) 14 App. Cas. 519.
(5) (1886) 18 Q. B. D. 67, 78.
(6) [1914] A. C. 510.
(7) (1875) L. R. 10 Q. B. 265.
(8) (1865) 18 C. B. (N. S.) 445.

best they could, had to pay more for the substituted goods and recovered the difference in price ; but that was on the ground that the value of the non-delivered goods must be taken as being the price of the nearest similar goods on the day of the breach. A carrier is not liable in damages " beyond the ordinary and natural consequences of his breach of duty, in the absence of something equivalent to a contract on his part to be liable to such damages," per Martin B. in *Horne* v. *Midland Ry. Co.* (1) If the appellants are right in principle on the evidence the value of the wheat should be taken, at the highest, as 22*s.* 6*d.* per quarter.

G. St. C. Pilcher and *Porges* for the respondents. On the evidence there was no market for this wheat, i.e., no market in which the plaintiffs could buy, and while no doubt sub-contracts must not be the basis of the assessment of damages where there is a market, they can be looked at, in cases where there is no market, as evidence of the value of the goods. Both *France* v. *Gaudet* (2) and *Hinde* v. *Liddell* (3) are strongly in the plaintiffs' favour on that point. The purpose for which the plaintiffs were going to put the wheat, namely, to resell it, must be taken into account. They had paid for it and resold it, and if they could have gone into the market and bought 47 tons of this wheat its value to them would have been 36*s.*

[GREER L.J. I know of no case where it has been laid down that the value to the owner of goods non-delivered is the proper basis.]

In all the cases of damage to ships restitutio in integrum would seem to be the basis : see *The Kate* (4) ; *The Racine* (5) ; *The Philadelphia* (6) ; and see also *The Edison.* (7) In *Wertheim* v. *Chicoutimi Pulp Co.* (8) Lord Atkinson said that the market value was taken " because it is presumed to be the true value of the goods to the purchaser."

[SCRUTTON L.J. This Court discussed *Wertheim's* case (8) in *Slater* v. *Hoyle & Smith, Ld.* (9)]

(1) (1873) L. R. 8 C. P. 131, 140.
(2) L. R. 6 Q. B. 199.
(3) L. R. 10 Q. B. 265.
(4) [1899] P. 165.
(5) [1906] P. 273.
(6) [1917] P. 101.
(7) [1932] P. 52 ; [1933] A. C. 449.
(8) [1911] A. C. 301, 307.
(9) [1920] 2 K. B. 11.

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Where there is a market the plaintiffs get complete indemnity, for they can buy to fulfil their sub-contracts, and if they have to pay more in the market for similar goods they get the increased price as the measure of their damages : *Hinde* v. *Liddell.* (1) In *The Edison* (2) the House of Lords seems to have gone further in the direction of complete restitutio than they did in *Williams Bros.* v. *Agius, Ld.* (3), for they gave the plaintiffs considerable sums under various heads of damage over and above the market price of the lost dredger. In the present case the plaintiffs could not buy, and as the goods had been paid for they are actually out of pocket to that extent. Different principles apply where there has been prepayment : see Halsbury's Laws of England, vol. 25, p. 271, and *Elliot* v. *Hughes.* (4)

In *Rodocanachi, Sons & Co.* v. *Milburn Bros.* (5) there was a market for similar goods, and the price had not been prepaid. That case, therefore, is distinguishable and is not against the plaintiffs' contentions, for although Lord Esher said that intermediate contracts must be disregarded he also said that if there is no market the result must be arrived at by an estimate, " by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination," and in fact the plaintiffs recovered more thereby than the sub-contract price.

[GREER L.J. Some of the observations in *Grébert-Borgnis* v. *Nugent* (6) would appear to be in favour of the plaintiffs' argument.]

All the authorities are in the plaintiffs' favour that where there is no market regard can be had to sub-contracts as evidence of the value of the goods : see e.g. Mayne, 10th ed., p. 17, and the cases there cited.

[MAUGHAM L.J. referred to *Stroud* v. *Austin.* (7)]

The defendants are endeavouring to apply the market price rule as regards the exclusion of sub-contracts to a case where there was in fact no market.

(1) L. R. 10 Q. B. 265.
(2) [1932] P. 52; [1933] A. C. 449.
(3) [1914] A. C. 510.
(4) (1863) 3 F. & F. 387.
(5) 18 Q. B. D. 67.
(6) (1885) 15 Q. B. D. 85.
(7) (1883) C. & E. 119.

[MAUGHAM L.J. referred on this point to *Sheik Mohammad Habib Ullah* v. *Bird*. (1)]

The defendants have wrongfully converted the 47 tons to their own use and in tort the plaintiffs are entitled to restitutio in integrum ; they have lost at least what they gave for the goods (36*s*. and 24*s*.), which, as regards part of them (having regard to the allowance of 6*d*.), was also the sub-contract price, and to give them anything less would, as Bateson J. said, " work an injustice to them."

Miller K.C. replied.

Cur. adv. vult.

1934. June 29. The following judgments were read :—

SCRUTTON L.J. In this claim for damages against a ship-owner for non-delivery of cargo, the registrar has assessed damages at 272*l*. The defendants had paid into Court 230*l*. as damages for shortage. The amount in dispute is apparently trivial, but becomes important when it is known that the trial judge has made the costs of a five days' trial depend on whether the plaintiffs recover more than the sum paid into Court. It is far better in such a case that the judge should adjourn his decision as to costs until he knows the result of the inquiry as to damages ; unfortunately, this course was not pursued, and we have no jurisdiction to alter the judge's order as to costs. Further, the determination of the amount of damages raises questions of principle affecting many cases and of far greater importance than the difference between 230*l*. and 272*l*.

Fortunately there is no dispute as to the facts necessary to raise the question of principle. On August 11, 1930, the plaintiffs, Spear & Thorpe, grain merchants of Hull, bought from Mr. E. Kampffmeyer, of Berlin, 1000 tons of Roumanian wheat " at time and place of shipment about as per sealed sample marked No. 727 in possession of buyers " at 36*s*. per quarter of 480 lb., less $2\frac{1}{2}$ per cent. including freight and insurance to Hull. The contract provided for notice of appropriation by seller to buyer with ship's name, date of bill of lading and quantity shipped, and for provision for the

(1) (1921) 37 Times L. R. 405.

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case of resales, and disputes between the parties in a chain of resales, "last buyer and intermediate buyer."

There is no dispute that the sample was an exceptionally good sample; all the witnesses at the reference called by either side admitted this. There is no evidence that the price was further above the market price at the date of the contract of good Roumanian wheat than would be justified by the excellence of the sample. On the conclusion of the contract in August, the buyers resold in parcels at the price of 36*s*. 6*d*. at once, on the excellence of the sample. The Berlin seller at the end of October shipped at Galatz 1000 tons on the *Arpad*, bound to Hull. There is some evidence that the price of good Roumanian wheat, though not of sample No. 727 at that date, October 31, was 24*s*., there having been a heavy fall in the market for wheat generally; but as the buyer had resold at 36*s*. 6*d*., this fall would not apparently affect him if he could make delivery under his resales.

The shipowners, the present defendants, issued bills of lading to the seller for one million kilos of wheat in bulk "cargo stored in Nos. 1, 2, 3, and 4 holds, 'tween decks and bunker as per plan, weight, quality, quantity unknown." The plan enables the specific wheat shipped to be identified. It is separated from other parcels. The seller then gave notice to the buyers appropriating the wheat on the *Arpad* under their contract, and the buyers in turn appropriated the proper quantities ex *Arpad* to their sub-buyers.

When the *Arpad* arrived at Hull at the end of 1930, there was found considerable mixture of the wheat with barley, and in the result the trial judge found short delivery to the plaintiffs of 47 tons of wheat. The question in this case is, What are the damages for that short delivery?

There is no question that if the wheat had been delivered by the ship, the buyers would have tendered it to their sub-buyers and would have received 36*s*. 6*d*. per quarter, less an allowance of 6*d*. per quarter under arbitration for inferiority to sample. They have lost that sum by the short delivery. Can they recover from the shipowner at law their actual loss? It is clear that there was no market at Hull on January 10,

the date of the last delivery from the *Arpad*, to which they could go and buy "Roumanian wheat as per sample No. 727," still less such wheat "ex *Arpad*." If the wheat had been delivered, and the buyers had not already resold it, I think it is clear that they could have resold it, but at a price considerably below 36*s*. 6*d*. owing to the fall of market. Whether the price they would have obtained on this hypothesis would have left them with a loss greater than the sum paid into Court is in dispute and is immaterial to the question of principle.

The registrar's report finds that there was no market in which wheat in accordance with sample No. 727 shipment, September/October, could be bought, and that as the buyers had paid for the wheat, they were entitled to recover the amount they had paid, less certain small allowances. He finds that only this rule would place the buyers in the position they would have been in if the wheat had been delivered according to contract. On appeal Bateson J. affirmed the result of the registrar's inquiry. He took the view that though no doubt the buyers, if they had the wheat and had not resold it, could have sold it at some price in Hull, they could not have bought any such wheat, and that to make a "market," you must have power to buy or sell. When the buyer has prepaid, "market price," says the judge, "is no criterion," and he is entitled to the repayment of what the wheat has cost him. This is what is necessary to give him restitutio in integrum, and the value of what he has lost, and there being no market, what he paid for the wheat and what he had sold it for are available to fix its value to him.

The appellants, the shipowners, contend that the registrar and judge were wrong, because, as Lord Esher M.R. said in *Rodocanachi* v. *Milburn* (1): "But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant,

(1) 18 Q. B. D. 67, 76.

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as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods." This decision was approved by the House of Lords in *Williams* v. *Agius, Ld.* (1) The appellants say that the law between shipowner and goods owner is the same, and that in this case it follows that the resales by the receiver of goods, which the shipowner knew nothing about, are "accidental circumstances" which do not affect him.

On the other hand, in *Rodocanachi* v. *Milburn* (2) there was a market in which cotton seed could be bought and sold, and the decision of the Court of Appeal giving the goods owner, who had sold goods to arrive at a price below the market price at the date when the goods should have arrived, damages based on the market price of the goods, was based on the fact that there was a market in which the price of the goods could have been ascertained, and the fact that the goods owner could not have obtained that market price, because he had sold the goods to arrive at a lower price, was "accidental" and could not be relied on by the shipowner. But Lord Esher, having dealt with the measure of damages when there is a market in which the value of the goods could be fixed, goes on to say: "If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination." In the present case there was, on January 10, no market in which wheat, in agreement with sample No. 727, could be bought; the cost to the shipper, 36*s*., is known, and there is no need to estimate the profit, for there has been a contract of resale to solvent buyers at 36*s*. 6*d*. If the wheat had arrived the receiver would have put that amount in his pocket; that is what he has in fact lost; he will not get restitutio in integrum unless he receives that amount as damages.

Where there is no market for the goods in question, both the text-books and the decided cases take the view that the contracts of the owner of the goods may be considered. Thus

(1) [1914] A. C. 510. (2) 18 Q. B. D. 67, 76.

in Mayne on Damages, 10th ed., p. 17: "But if the goods cannot be replaced for want of a market, their value must be estimated in some other way. If there has been a contract to resell them, the contract price will be evidence of their value." Then in Benjamin on Sale, 7th ed., at p. 1019, as to claims in contract: "Where there is no market. Where the seller at the time when he made the contract knew that the goods had been sub-sold or . . . . would probably be sub-sold, the buyer . . . . may recover as special damages the loss of his actual or anticipated profits." In Chalmers' Sale of Goods, 11th ed., at p. 135, it says: "In the case of non-delivery, where there is no market and the sale is for purposes of resale, the measure of damages is the difference between the contract price and the resale price." Where there is no market, s. 51, sub-s. 2, of the Sale of Goods Act is the applicable provision: "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." This brings in, in claims of contract, the contemplation of the parties, including the knowledge of one contracting party, either from actual communication, or from business knowledge, that the goods dealt with may probably be resold, so that failure to deliver them may probably prevent, if there is no market, the performance of a contract for resale and cause probably loss of profit.

I am, of course, not overlooking the position that the circumstances of the resale contracts may be so peculiar, or involve such an unusual price, that the other party to the contract is not liable for them unless he has such notice of those circumstances that he must be taken to accept liability for them: *Horne* v. *Midland Ry. Co.* (1)

It is often said that the measure of damages in contract and tort is the same; I do not think this is strictly accurate. The second branch of the rule in *Hadley* v. *Baxendale* (2) requires, in the case of breach of contract, where the damages are alleged to flow from the existence of another special contract which is affected by the breach of the first contract,

(1) (1872) L. R. 7 C. P. 583; L. R. 8 C. P. 131. (2) 9 Ex. 341.

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that that consequence may be supposed to be in the contemplation of both parties as the result of the breach, and notice of the special contract, or the probability of such a special contract being made, is required to affect the defendant with liability for damage flowing from the special contract being affected by the breach of the contract. An instance of the sort of notice required is where the plaintiff is known to be buying for resale, though he has not yet resold. Thus in *Lyon* v. *Fuchs* (1), where the seller knew that the buyer was buying for resale, though he did not know of the contract of resale which the buyer afterwards made, Rowlatt J., there being no market, gave the plaintiff the profit he lost by being unable to perform the contract of resale. *Mott* v. *Muller* (2) is to the same effect. The matter is fully discussed by Salter J. in a careful judgment in *Patrick* v. *Russo-British Grain Export Co.* (3) In *Braun* v. *Bergenske Steamship Co.* (4) Bailhache J. heard an action against a carrier by an owner of goods for conversion of his goods by delivering them to a person who had no title to them. The plaintiff had resold the goods for 925*l.* They were bales of dried hides, apparently sold by sample, and apparently there was no market in which they could be bought in England, and therefore no evidence of market price. The judge gave the plaintiff 925*l.* as the value of the hides, as there was no evidence that the person to whom he had sold had paid more than the market price at the time of the sale. No doubt if the plaintiff had got the goods he could have resold them at some price. But in my view, one cannot consider a market price where there is no market in which you can buy to replace. It takes buyers and sellers to make a market.

In the cases of claims in tort, damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby-looking man in the street, and he turns out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on; or you negligently and ignorantly injure the

(1) (1920) 2 Ll. L. R. 333.
(2) (1922) 13 Ll. L. R. 492.
(3) [1927] 2 K. B. 535.
(4) (1921) 8 Ll. L. R. 51.

favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice. You have to pay the actual loss to the man or his goods at the time of the tort, which is fixed by the circumstances at the time of the demand : see Benjamin on Sale, 7th ed., p. 1018.

In the peculiar case where goods are carried by a carrier under a contract which protects him from liability for a particular damage, the goods owner cannot recover by claiming in tort, for the reasons given in the House of Lords in the well known case of *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (1) But where, as in the present case, there is an unjustified breach of contract, and the tort of conversion, the goods owner can claim in tort for conversion and bring in the loss on a contract of resale without proving notice of it to the carrier, unless there is some very unusual feature in the contract. I am inclined to think that in contracts of carriage from wheat-producing districts, it is always so probable that the shipper is sending for resale, or for sale to a person who will resell, that the carrier will be liable if there is no market, for the effect on a contract of sale of his conversion or unjustifiable failure to deliver. I observe that Lord Macnaghten in *Ströms Bruks Aktie Bolag* v. *John & Peter Hutchison* (2) says : " Although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen & Co., they must have known, as every business man in their position would know, that in all probability the goods were being despatched to England in order to fulfil some contract either actually in existence at the time or in immediate contemplation, so that a breach of their contract with the manufacturers in Sweden might cause a breach of contract with some manufacturer or merchant in England, and lead to a claim of damages by him against the shippers of the goods. The respondents, therefore, were certainly not justified in assuming that in the discharge of their obligations punctuality was a matter of little moment."

The question of damages for conversion in such a case was

(1) [1924] A. C. 522. (2) [1905] A. C. 515, 524.

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considered in *France* v. *Gaudet*. (1) In that case the plaintiff had bought 100 cases of champagne at 14*s*. a dozen, lying at the defendant's wharf, and resold it to the captain of a ship about to leave England at 24*s*. a dozen. Champagne of that brand and quality was not procurable in the market. The wharfinger wrongfully refused to deliver till after the ship had sailed, the captain declining to wait for the champagne. It was urged, on the authority of *Hadley* v. *Baxendale* (2), that a wharfinger having no notice of the special value of the champagne, was not liable for the loss of profit; but a Court comprised of Mellor, Lush, and Hannen JJ. held that there being no market, the actual value of the champagne, as measured by the price on the sale to a solvent customer, ought to be the measure of damage. In trover the plaintiff can recover the special value attached by special circumstances to the article converted. The plaintiff was entitled to the immediate delivery of the article, and no notice would affect its actual value, which was the same as the actual present loss to its owner. In other words, there being no market either to fix its value or in which the owner could replace it, the actual value or loss to the owner could be fixed by what the owner could get by a resale to a solvent purchaser. Apart from that, there is no doubt that here in fact, by the defendants' wrongful conversion, the plaintiffs lost 36*s*., 36*s*. 6*d*. the resale price less 6*d*. a quarter allowance for slight inferiority to sample, which under the resale contracts did not entitle the sub-buyers to reject. There was no market in which the buyers could purchase wheat as per sample No. 727 ex *Arpad*. In other words, the wheat ex *Arpad* was a specific article resold and not capable of replacement.

France v. *Gaudet* (1) has stood unchallenged for over sixty years; the only comment I can find on it is that in *Horne* v. *Midland Ry. Co.* (3), where Mellor J. said that it turned on there being no market, and Martin B. said that it was a case of vendor and purchaser and turned on different considerations. As to this, Blackburn J. has said that vendor

(1) L. R. 6 Q. B. 199.

(2) 9 Ex. 341.

(3) L. R. 7 C. P. 583.

and purchaser and carrier and goods owner were in contract the same thing: the carrier agreed to provide conveyance of goods, the vendor the goods themselves. The real distinction is, I think, between a tort, the damages for which do not require notice to the wrongdoer of their probability, and contract, where *Hadley* v. *Baxendale* (1) requires the consequences to be in the contemplation of the parties.

The damages for torts to property have been recently considered by the House of Lords in *The Edison*. (2) In that case the defendants' ship sank the plaintiffs' dredger, which was at the time engaged in a profitable contract of which the defendants had no notice. The House of Lords gave the plaintiffs (i.) the market price of a comparable dredger, (ii.) the cost of its adaptation, transport and insurance to the place of loss, (iii.) compensation for disturbance and loss in carrying out the contract up to the time at which the substituted dredger could reasonably have been available at Patras. The decision in *The Argentino* (3) is to the same effect.

In *The Edison* (4) I endeavoured to give to the plaintiffs the value of the dredger to them as a going concern, following the judgment of Lord Gorell in *The Harmonides*. (5) I certainly intended to include in that value the dredger's position on a profitable contract, but apparently I did not express myself with sufficient clearness, as Lord Wright, "feeling grave doubt," did not think I intended to include any allowance for the disturbance of the contract. I did, to the best of my recollection, intend to cover that allowance by the words "value as a going concern to the owner." *The Edison* (4) appears to me to be a decision on the same lines as *France* v. *Gaudet*. (6)

In my opinion the damages in conversion should be the value to the purchaser or goods owner at the time of the conversion. If there is a market in which he can buy, this will fix the value; if there is no market, it may be determined by the goods owners' contract with a solvent purchaser, for that is what he has in fact lost by the conversion.

(1) 9 Ex. 341.
(2) [1933] A. C. 449, 468.
(3) 14 App. Cas. 519.
(4) [1932] P. 52; [1933] A. C. 449.
(5) [1903] P. 1.
(6) L. R. 6 Q. B. 199.

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It may well be that this rule does not logically fit in with the damages in contract where there is a market, and where, as in *Rodocanachi* v. *Milburn* (1), the plaintiff may recover more than he has lost, or, as in *Hadley* v. *Baxendale* (2) and *British Columbia Saw Mill Co.* v. *Nettleship* (3), less than he has in fact lost. But this depends on the fact that in contract you look at the date of the contract to see what was contemplated, of what there was notice, and in tort you look at the date of the tort, when notice is irrelevant.

I should therefore be of opinion that the result arrived at by the judge below and the registrar is correct, and that the appeal should be dismissed with costs. But as my brothers are of a different opinion, for reasons expressed in their judgments, the result will be as they direct.

A complicated argument of fact was addressed to us to show that if the above conclusion was incorrect, yet the value in the market without considering the resale was sufficient to exceed, though only slightly, the amount paid into Court. I do not think the Court of Appeal should be called on to do this calculation of fact, which is a matter for the registrar and merchants.

GREER L.J. The facts proved in this case so far as they are relevant to the question which arises for determination in this appeal may be briefly stated as follows.

On August 11, 1930, the respondents, who are grain merchants carrying on business at Hull, bought from Mr. E. Kampffmeyer 1000 tons of Roumanian wheat as per sealed sample No. 727 in possession of buyers at the price of 36*s.* less 2½ per cent. per 480 lb. shipped, including freight and insurance to Hull, to be shipped from a Black Sea and/or Danubian port or ports, on a bill or bills of lading dated or to be dated during September and/or October, 1930, the bill of lading to be dated when the goods were actually on board. On the same date or the next day, the respondents contracted to sell to eight separate buyers various quantities of wheat

(1) 18 Q. B. D. 76. (2) 9 Ex. 341.
(3) (1868) L. R. 3 C. P. 499.

amounting in the aggregate to 1000 tons to be shipped as per bill or bills of lading during September and/or October, 1930, from a Black Sea or Danubian port or ports, quality as per sealed sample in sellers' possession. The sealed sample was in fact the same sample as that on which the respondents had bought. The contracts were not c.i.f. contracts, but were contracts for delivery on arrival at Hull, at 36*s.* 6*d.* per quarter of 480 lb. As the sub-contracts did not describe the goods as goods to be shipped on a steamship to be declared, it cannot be said that the sub-sales were specific sales of the agreed numbers of quarters which were shipped by the respondents on the s.s. *Arpad*, but I think this is of no consequence, inasmuch as it was common ground in the case that all the sub-sales were of goods for delivery in Hull shipped in September/October and equal to sample No. 727, and goods answering to that description could not be bought in the grain market in England at the date when the plaintiffs' cause of action arose.

In September and October and the first few days of November grain was put on board the s.s. *Arpad* to the amount of one million kilograms of wheat in bulk, and in accordance with the respondents' contract with their seller, the goods so shipped were appropriated to the contract. The goods so shipped were not quite up to the sample, and in accordance with a term in the contracts an allowance of 6*d.* per quarter became deductible from the contract price. The respondents were entitled to this allowance from their seller, and were bound to make a similar allowance to their buyers. Accordingly, if the whole quantity which had been shipped had been delivered to the respondents, they would have been entitled to receive 36*s.* per quarter in respect of it, but unfortunately, when the *Arpad* had discharged her cargo it was found that the appellants were unable to comply with their contract to deliver the whole quantity shipped, inasmuch as 47 tons had been so mixed with barley that a tender of it could not be properly described as a tender of 47 tons of the wheat that had been shipped. Therefore, on the facts as proved at the trial of the action, which are not now in

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dispute, there was a shortage on delivery for which the owners of the steamship were responsible to the amount of 47 tons. There were certain other questions disposed of in the course of the action, with which this appeal is not concerned, but Langton J. held the appellants liable in respect of the claim based on the short delivery of 47 tons. In the statement of claim this was put as a claim for damages for breach of the contract of carriage contained in the bill of lading, or in the alternative, as damages for conversion, the conversion being the failure to deliver, or refusal to deliver.

The action came for trial before Langton J., who decided that the appellants were liable, and gave judgment in favour of the respondents against the appellants for damages in so far as such claim related to the admixture and consequent short delivery of 47 tons of the said wheat, and ordered that the costs should depend on whether the respondents recovered more than the amount paid into Court. The difference between the plaintiffs' claim and the sum paid into Court is a matter of 40*l.* or 50*l.*, but unfortunately the costs are very heavy, as the trial before Langton J. lasted for five days, the reference took about the same time, and there was then an appeal to Bateson J. Now the case has been brought by way of appeal to this Court. The amount originally in dispute must be comparatively insignificant compared to the amount of the costs which will have to be met by the defendants if they have under-estimated, to however small a degree, the damages to which the plaintiffs are entitled.

The *Arpad* finished discharging the bill of lading wheat early in January, 1931. There was evidence which entitled the registrar to find that there was at that time no Roumanian grain procurable equal to the sample No. 727. The respondents, therefore, were unable to tender to their buyers 47 tons of grain which the latter would have been bound to accept. The buyers were entitled to have September and October shipment of goods which would correspond to the sample, subject to the term of the contract that difference in quality or condition should not entitle them to reject

except under the award of the arbitrators, or the committee of appeal of the Corn Trade Association. If the respondents had received the 47 tons, they would clearly have been entitled to have received in respect of them from their sub-buyers 36*s.* 6*d.*, less an allowance of 6*d.* per quarter for defective quality or condition. It was established to the satisfaction of the registrar and the judge that there was no market in which Roumanian grain could be purchased of the contract description which the respondents could have used for the purpose of implementing their sub-sales. There can be no doubt that in fact they lost 36*s.* per quarter on the whole of the 47 tons by reason of the fact that they had resold when the market was high, and were unable to perform their contracts by purchasing in the market goods that would comply with the description contained in their contracts with their buyers, nor were they able to prove that there were any goods available on the market the purchase of which would enable them or their sub-purchasers to fulfil their requirements.

This case falls to be decided in the light of the fact that having regard to the forward contracts the respondents had made with their buyers in August, 1930, they in fact suffered a loss of 36*s.* per quarter. The registrar and merchants found that their damages must be estimated on this basis, and Bateson J. confirmed that finding on appeal to him. We have now to determine whether, having regard to the law relating to the measure of damage in actions whether of contract or of tort, the decision of the learned judge was right.

Apart from any difficulty that may be occasioned by decisions of the Courts, it seems to me unreasonable to hold that a shipowner contracting with the shipper on the terms of a bill of lading should be held liable to pay damages occasioned to an unknown assignee of the bill of lading, measured by the loss sustained by reason of the latter's inability to comply with a contract made two months before the shipment by such unknown assignee, the shipowner having no notice of such contract and no opportunity of refusing

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to carry goods on the terms that he should be so liable. The decisions of the Courts do not, in my judgment, involve any such unreasonable measure of the damage payable by a shipowner for failure to deliver the goods shipped. If there is a market at the time when the goods should be delivered in which goods of a kind fit to implement the contract made by the owner of the bill of lading at the time of breach can be bought or sold, the measure of damage is the value of the goods ascertained by the market price of identically similar goods. When there is no such market, the value must be otherwise ascertained, and the price at which the holder of the bill of lading has in fact sold them five months before is not very satisfactory evidence of their value at the time of the breach. In the case of a claim by a purchaser against a vendor of goods as to which a market price is unascertainable, the price at which the buyer has resold the goods may be accepted as evidence of their value. But the Court is not bound to accept such evidence as conclusive if the value can be otherwise ascertained. On the facts proved in the present case it is clear that the price fixed by the August contracts cannot be relied on as any evidence of the value of the goods at the date of breach.

The judgment of the Court in *Hadley* v. *Baxendale* (1) opened a new chapter in the law of damages. The measure of damages there laid down by the Court of Exchequer has since been invariably applied in cases which involved the consideration of the true measure of damage. I had occasion in the course of my judgment in *The Edison* (2) to state in a summary manner the material facts proved in that case, and the rules for estimating damages as stated in the judgment of the Court. I need not repeat my observations here.

In the present case no notice was or could be given by the respondents to the appellants before the goods were shipped, or at any time, of the prices at which they had bought or the prices at which they had sold, or indeed that they were buyers or sellers at all. For all the shipowners knew the shippers might have been millers who were shipping the

(1) 9 Ex. 341. (2) [1932] P. 52, 70.

wheat for their own use in their mills, or they might have been buying to fulfil contracts made when wheat was lower in price than it was when the goods were shipped, or they might have been bought by the shippers or by the plaintiffs in the expectation that market prices would rise. As far as appears, the respondents had no interest in the goods at the date of shipment. They only became interested when the bills of lading were assigned to them. If they had been able to buy other wheat equal to the sample shipped in September and October, they would have been entitled to use the goods for their contracts of sale. There was no evidence showing the date when the bill of lading was assigned to them. The shipowners did not and could not know that the respondents were interested in any way in the goods until the bill of lading was presented to them by the plaintiffs.

The point to be decided, so far as the claim is based on contract, is narrowed down to the answer to the question whether the damages arising from the fact that the respondents had sold the cargo at the high values prevailing in August, 1930, "*may fairly and reasonably* be considered as arising naturally according to the usual course of things" from the breach of contract. Another question which has to be determined is whether, assuming that the Court is precluded by the rules as to the measure of damage from taking into account the loss occasioned to the respondents by their inability to perform the contracts with their buyers, the same rule is applicable to the alternative claim for damages for conversion. At the time when the appellants broke their contract of carriage by short delivery, the value of the 47 tons which they failed to deliver, estimated by what it would sell at in the ordinary course of business at the date of the breach, was ascertainable, because it is quite clear that though there was no market in which goods similar to the sample No. 727 could be bought, there was a market in which they could have been sold.

In my opinion it has been decided both by the Court of Appeal and the House of Lords that in estimating the loss occasioned to a claimant by non-delivery of the goods which

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he is entitled to have delivered to him, contracts which he has made at a date far removed from the date of the breach of contract have to be neglected in considering what is the measure of damage which has to be applied under the first rule in *Hadley* v. *Baxendale*. (1) In *Rodocanachi* v. *Milburn* (2) the plaintiffs, before the shipment of a cargo of cotton seed in accordance with the charterparty, had sold the cargo to arrive at a price less than the market price at the port of discharge at the time when the ship in the ordinary course should have arrived there. The cargo never arrived, but was lost by negligence. It is clear that in that case the sale was a sale of the specific cargo, and the plaintiffs were unable to fulfil the sales they had in fact made, because the specific cargo had ceased to exist. They had sold the cargo at a price which was less than the market price at the port of discharge at a time when the ship in the ordinary course should have arrived there. It is plain that there was no market at that time in which the plaintiff could have bought the specific cargo which he had sold. He might possibly have bought something as good, but he could not have compelled his buyers to take anything other than the specific cargo which he had sold to them. It was held by the Court of Appeal that the Court should leave out of consideration the sale made by the plaintiff, and, as I understand the decision, it was held that the measure of damage was the selling value of the goods at the date when they would in the ordinary course have arrived, and whether this was more or less than the damage which a plaintiff sustained by reason of the fact that he had made a contract of resale is irrelevant; the damage is still to be estimated without regard to his contract of resale, by finding what the value to him would have been if such sale was left out of consideration. Lord Esher M.R. said (2): "The measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. . . . . Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less

(1) 9 Ex. 341. (2) 18 Q. B. D. 67, 76.

what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for sale of the goods." The law is stated to the same effect by Lindley L.J., who said (1): "The rule in an action such as this seems to be well settled, viz., that the damages are the value of the goods at the port of discharge, minus the accruing freight, and that any contract for sale of the goods made by the charterers, whether at a greater or less price than the market value, is not to be taken into account. It is admitted that a contract

(1) 18 Q. B. D. 67, 78, 80.

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for sale at a larger price could not be taken into account; but it is contended that nevertheless one made at a less price should be." Lopes L.J. said (1): "I think the true rule is that the measure of damages in such a case must be the market value at the time when and place where the goods ought to have been delivered independently of any circumstances peculiar to the plaintiff, but deducting therefrom what he would have had to pay to get the goods."

I cannot understand the judgment as meaning other than this, that what has to be ascertained is the value of the goods at the date of the breach, and that in estimating that value the law does not take into account an intermediate contract entered into with a third party for the purchase or sale of the goods. That case was expressly approved by the House of Lords in *Williams* v. *Agius, Ld.* (2) The House of Lords there held that in a case of non-delivery by a seller to a buyer, the true measure of damages was the difference between the contract price and the market price at the time of the breach, and that the fact that a seller had agreed to sell the goods at a lower price could not be taken into account to diminish the damages. It is true that the sub-sale does not appear to have been a sale of a specific cargo, but only a sale of a cargo of coals of the same amount and description. Lord Dunedin points out that claims for damages for delay in delivery are not the same as claims for damages for non-delivery. He says: "But when there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price (*Great Western Ry. Co.* v. *Redmayne* (3)), nor can he take benefit of the fact that the buyer has made a forward resale at under the market price." I do not think

(1) 18 Q. B. D. 67, 78, 80. (2) [1914] A. C. 510, 522.
(3) (1866) L. R. 1 C. P. 329.

that these observations can be taken to mean that the difference between contract price and market price is recoverable because the buyer can diminish the damages by going into the market and buying. The market price which is treated as the value at which the goods are to be taken for the purpose of estimating the damages means the price at which the goods can be sold on the market. And the noble and learned Lord points out that even if the sub-sale is of the selfsame thing or things, it would be equally right to say that the resale price ought not to be taken into account. If the Court is dealing with a case in which the sub-sale is a sale of the selfsame thing, that involves the fact that there is no market in which the thing sold can be bought, but only a market in which it can be sold.

Hall v. *Pim* (1) was not a case in which the Court had to consider the effect of the first rule in *Hadley* v. *Baxendale* (2); it was a decision as to damages as between buyer and seller, and the House of Lords held that the sub-sales could be looked at, because by reason of the contract between the plaintiffs and the defendants such sub-sales were contemplated, so that the case was brought within the second rule in *Hadley* v. *Baxendale.* (2) In the present case there is nothing in the bill of lading contract to call the attention of the shipowner to any question in any way relating to the sale of the goods by the shipper or his assignee. In my judgment, *Hall* v. *Pim* (1) has no bearing on the question to be decided in the present case.

There was evidence before the registrar which proved beyond the shadow of doubt that the selling value of all classes of wheat had greatly diminished between August, 1930, and January, 1931. I think the registrar ought upon the evidence to have made an estimate as to what the value of 47 tons of grain of the quality of the goods when they were shipped was at the date of the appellants' breach of their obligation to deliver, and that in making this estimate he ought to have disregarded entirely the contracts made by

(1) 33 Com. Cas. 324. (2) 9 Ex. 341.

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the respondents in August of the year before—about five months before the date of the breach.

So far I have dealt with the case as if the respondents' claim in the action was merely a claim for damages for breach of contract of carriage. It remains for me to deal with the question as to what is the measure of damage as applied to the alternative claim for damages for conversion. It has been laid down in judgments of high authority with which I do not find myself able to differ, that the measure of damages in cases of tort are the same as those in cases of contract, with the exception that in cases of tort the Court has only got to consider the first rule in *Hadley* v. *Baxendale* (1), whereas in cases of contract there may be, under the second rule in *Hadley* v. *Baxendale* (1), a larger measure of damages. In my judgment in *The Edison* (2) I referred to these authorities and applied them to the case then under consideration. I referred especially to the judgment of Bowen L.J. in *Cobb* v. *Great Western Ry. Co.* (3), and of the same Lord Justice in *The Argentino* (4), and I acted upon the statement of the law by Bowen L.J. and applied it to the case then being considered. What is perhaps more important is what Scrutton L.J. said in the course of his judgment in *The Edison* (5): "Generally, however, it is clear on the authorities that the measure of damages is the same in Admiralty and common law; and that it is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort." I do not think there is anything in the decision of the House of Lords in *The Edison* (6) which is inconsistent with that proposition of law. Where the House of Lords differed from the Court of Appeal was with regard to the way in which the first proposition in *Hadley* v. *Baxendale* (1) applied to a case in which the plaintiff had been deprived of an instrument of his trade under circumstances

(1) 9 Ex. 341.
(2) [1932] P. 52, 68, 69.
(3) [1893] 1 Q. B. 459.
(4) 13 P. D. 191.
(5) [1932] P. 52, 61.
(6) [1933] A. C. 449.

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which prevented him from immediately procuring a substitute. It had been frequently decided that if a shipowner is deprived for a short time of the use of a vessel which he uses in his business for the purpose of earning profits, the Court can take into account the actual engagements of his ship during the time he is so deprived of the use of it. If, as in *The Edison* (1), he is permanently deprived of his ship, it follows that during the time he is so deprived, that is to say, until he can supply himself with another ship to do the work, he is entitled to the same measure of damages for loss of business between the time when his ship has been destroyed and a reasonable time in which he can obtain a substitute as he would have been entitled to if his claim had been not for loss but for being temporarily deprived of the use of his ship. This seems to me, if it is not impertinent to say so, clearly right, but as far as the judgment in the Court of Appeal was concerned the sum awarded as part of the value of the ship at the time of her loss was intended to include a sufficient sum for loss of the use of the dredger until the plaintiffs obtained a substitute. I see nothing in the decision of the House of Lords in *The Edison* (1) which has any bearing on the question as to what is the measure of damage, whether claimed in contract or tort, for the wrongful deprivation of a marketable article which has been bought for sale and can be sold. What, then, is to be said about cases like *Borries* v. *Hutchinson* (2) ; *Grébert-Borgnis* v. *Nugent* (3) ; and *France* v. *Gaudet*. (4) The two former cases were cases of breach of contract, where the buyer had given notice that the goods were bought for resale but no notice of the terms of the resale. There was no market for the particular goods sold. It was admitted by the seller that the buyer was entitled to his loss of profit on the resale. The Court, while approving of this admission as right in law, had to deal with further claims depending on the terms of the resale, some of which were allowed, and some disallowed. In both these cases there was notice that the goods were bought for the purpose of fulfilling

(1) [1933] A. C. 449.
(2) 18 C. B. (N. S.) 445.
(3) 15 Q. B. D. 85, 89.
(4) L. R. 6 Q. B. 199.

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contracts of resale, though the exact terms of such resale contracts were not communicated. They were cases which the parties accepted as within the second rule in *Hadley* v. *Baxendale*. (1) Lord Esher (then Sir William Brett M.R.), in giving judgment in the Court of Appeal in *Grébert-Borgnis* v. *Nugent* (2) used words which have since been frequently accepted as applying to the measure of damage where there is no notice that the goods are bought for the purpose of fulfilling an existing or contemplated resale: "If such sub-contract was not made known to him at all the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, though not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value."

This statement of the law has been acted upon on frequent occasions. I fully accept it. But I do not read the law so stated as applicable to a case like the present in which the value fixed by the sub-sale is proved not to be the real value of the undelivered goods at the date of the breach. In my judgment the damages claimed on the basis of the damages suffered by the respondents by reason of the sale made by them of similar goods to be shipped in September and October are, to quote the words of Blackburn J. in *Horne* v. *Midland Ry. Co.* (3), "damages of an exceptional nature, arising from special and peculiar circumstances" of which no notice was given to the defendants when they received the goods for carriage. When there is no evidence of the value other than the price the plaintiff was able to obtain this value may be accepted as evidence of value at the date of the breach of contract. But in this case there was ample evidence that at the date of breach the value of all wheat had greatly diminished. On the principle laid down in *Rodocanachi* v. *Milburn* (4) the registrar should have taken into account all

(1) 9 Ex. 341.
(2) 15 Q. B. D. 85, 89.
(3) L. R. 8 C. P. 131.
(4) 18 Q. B. D. 67.

the evidence given before him, and found the fair value at the date of the breach, disregarding the fact that the plaintiffs intended to use the cargo for the purpose of implementing the sales they made in August.

With regard to *France* v. *Gaudet* (1), in so far as the reasons given by the Court depend on drawing a distinction between the damages that may be awarded on a claim for non-delivery, which may in the alternative be treated as a breach of contract or a tort, I think, though the decision may be supported on other grounds, the reasons stated for the decision by Mellor J. cannot be supported. I note in passing that the Court adopts as the law applicable to non-delivery as a breach of contract, the following sentence from Sedgwick on Damages, though they failed to apply the law so stated in the case they were deciding: "It appears to me that, in principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may be thus said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver, or actual conversion, and that the damages should be estimated as at that time."

In my judgment, where the wrong complained of may be stated either in tort or in contract, the same rules as to damages must be applied.

In addition to the decisions already cited, I refer to *Fleming* v. *M. S. & L. Ry. Co.* (2) Adopting the words of Lord Bramwell, I say that in the present case under appeal "the real ground of complaint was the breach of contract to deliver." In *Horne* v. *Midland Ry. Co.* (3) Mellor J. explains the decision in *France* v. *Gaudet* (1) as based on the absence of any evidence of the value of the goods other than the sale by the plaintiff. "There was" he says "no other test of the value of the goods." *Horne* v. *Midland Ry. Co.* (3) is an important authority against the respondents' claim in the case under appeal, because (i) The market value taken as the measure of the defendants' liability was not the cost of procuring similar goods in the market, but the price

(1) L. R. 6 Q. B. 199. (2) (1878) 4 Q. B. D. 81, 84.
(3) L. R. 8 C. P. 131, 132.

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procurable by the plaintiff by sale in the market. (ii) It was a claim against a carrier, and some of the judges who decided the case thought that the measure of damages was not necessarily the same in its application to claims against a carrier as it would be against a seller for late delivery or for non-delivery, and (iii), though the claim was a claim for late delivery, both Martin B. and Blackburn J. treat the principle as similar to that which would have to be applied if the goods had never been delivered at all. Martin B. says (1): "Suppose the goods, instead of merely being delayed in delivery, had been burnt while in defendants' custody. Would the plaintiffs have been entitled to recover for them at the rate of 4*s.* a pair, or only their value at the time when they were burnt? It strikes me that they could only recover their value when burnt, and not their value calculated according to the price at which they were sold some time before, when the market was higher," and later, "If some other person had delivered a similar quantity of shoes to the defendants for carriage on the same day as the plaintiffs, not being under contract to deliver them, it is admitted he could only recover 20*l.*" In the judgment of Blackburn J. we find the following statement of the law as that eminent lawyer thought it was: "If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered." (1) It is worthy of note that in that case there was not, in the proper sense of the word, any market in which goods of the kind which are specially made for the French could be procured.

In my judgment *France* v. *Gaudet* (2) ought not to be accepted as a decision that in assessing the damage caused to a buyer by non-delivery, the damages are necessarily what

(1) L. R. 8 C. P. 131, 139, 140. (2) L. R. 6 Q. B. 199.

he has lost on a contract of resale, but merely that, in the absence of other evidence, the cost of resale may be treated as the value of the goods.

I do not think it necessary to refer the case back to the registrar for reconsideration. We have the same materials that he had before him for determining what the value of the 47 tons was at the material date when the defendants failed to deliver them in a condition in which the plaintiffs were entitled to receive them. On consideration of the evidence taken before the registrar, I think we ought to decide that the value must be reckoned on the basis of 23*s.* 6*d.* per quarter for the 47 tons.

I desire to add, in order to prevent a misunderstanding of this judgment, that the decision must not be treated as a binding decision with regard to the measure of damages in the case of an action for damages for personal injuries. So far as I am concerned, I desire to reserve the question whether a plaintiff in an action for damages for personal injuries can recover for the loss he has in fact sustained through inability to perform a contract of an unusual and exceptionally remunerative character. We are only deciding the measure of damages applicable to damages of which the plaintiff complains of the temporary or permanent loss of an article of commerce usually purchased for resale.

The appeal will be allowed with costs, the judgment of Bateson J. will be set aside, and judgment entered for the amount so ascertained with the consequences as to costs provided for by the original order of Langton J.

MAUGHAM L.J. The question of law that arises on this appeal may be stated very simply. It is this : What is the proper measure of damages when upon a contract of carriage by sea the shipowner fails to deliver the goods at the port of arrival, and it happens that there is at that port no market at which similar goods could be purchased at the date of breach ? There is no dispute as to the main facts, which have already been stated in the preceding judgments, and I need not repeat them ; but I must make it clear that in

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the circumstances of this case the shipowner could not, in my view, properly be held to know that the plaintiffs or any other holder of the bill of lading had entered into contracts of sale or was procuring the goods for the purpose of resale. I agree with what my brother Greer has said on this point, and need not repeat it. Such cases as *Patrick* v. *Russo-British Grain Export Co.* (1) have in my judgment no application, and I do not desire to express any opinion with regard to them.

The question is in this Court mainly one depending on authority, but I will permit myself two general observations. The first arises from a consideration of the nature of a market for goods. It seems to me illogical to apply one rule if the goods shipped have been sold by the plaintiff ex a particular ship or according to a sealed sample, with the result that generally speaking there is no market for those particular goods at the port of destination, and another measure of damage if the goods are merely goods of a particular description and quality. A rule which is in effect one of remoteness of damage ought, it seems to me, to apply in either case. The other observation is that I think it would be very unfortunate if shippers or purchasers of goods carried by sea were in a position, during a perhaps prolonged period, to enter into contracts of sub-sale and to please themselves as to whether these were disclosed in the event of a dispute arising such as one based on short delivery. Most of such disputes are settled otherwise than in the Courts, and even if the matter comes to be determined by due process of law, I do not think that the right of the defendant to discovery is a satisfactory safeguard if there has been a considerable fall in the market since the contract of sale was made.

I will now refer to the leading authorities. It has long been settled as a general rule in such a case, whether there is a market or not, that the owner is entitled to *the value* of the goods at the place to which they were consigned. It follows, as regards ascertaining the value, that if there is a market for such goods, the measure of damages is the market

(1) [1927] 2 K. B. 535.

price of the goods at the date when they should have been delivered. Such a purchase in the market is taken to put him in the same position as if the goods had been duly delivered; but it is also well established that in such a case, at any rate if the plaintiff is suing in contract, agreements for sale entered into with third parties by the plaintiff consignee (which may for convenience be called "sub-contracts") cannot be looked at either for the purpose of increasing or reducing the damages, unless sufficient notice of the sub-contracts has been given to the carrier or shipowner. These rules are closely similar to those which apply upon failure to deliver under a contract for the sale of goods, rules now embodied in s. 51 of the Sale of Goods Act, 1893, a section declaratory of the existing law. The Courts have refused to look at the sub-contracts entered into by the plaintiff in such a case (in the absence of notice to the defendant at the date of the contract) on the ground that any sub-contract is an accidental circumstance peculiar to the plaintiff; and it is a rule closely analogous to the rule that actual loss of profits and damages payable to sub-purchasers or other sub-contractors are not ordinary consequences of delay or failure to deliver. As examples of the many cases that illustrate the rule the following may be mentioned: *Hadley* v. *Baxendale* (1); *Gee* v. *Lancashire and Yorkshire Ry. Co.* (2); *Great Western Ry. Co.* v. *Redmayne* (3); *Rodocanachi* v. *Milburn.* (4) It is manifest, then, that if there is a market the plaintiff will not be awarded damages on the footing of the actual loss *to him* occasioned by the defendant's default, and the Court disregards the sub-contract which may have been a sale at a price substantially higher or lower than the market price at the date when the goods should have been delivered.

In the present case, the first question that arises is whether the measure of damage for a breach of a contract of carriage, in a case where the goods are not procurable in the market at the time of breach, differs from the rule as above stated

(1) 9 Ex. 341.
(2) (1860) 6 H. & N. 211.
(3) L. R. 1 C. P. 329.
(4) 18 Q. B. D. 67.

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so far as regards the exclusion of the consideration of sub-contracts entered into by the plaintiff. It is not in dispute that even if there is not a market price the damages are to be taken by reference to " the value of the goods at the time of the breach," and there may be different methods of arriving at the value in the particular circumstances. I have, however, been unable to find any case which suggests that the law (in the absence of notice at the date of contract) will take into account in estimating the damages, an intermediate contract with a third party, which is, to use Lord Esher's words, accidental as between the plaintiff and the defendant. I will refer first to *Borries* v. *Hutchinson* (1), in which there was a valuable judgment by Sir James Shaw Willes. This was a contract by a defendant to sell caustic soda to the plaintiffs for shipment from Hull, delivery to be made in June, July, and August, and the defendant knew that the plaintiffs were buying for the purpose of fulfilling a contract with a foreign merchant. In fact, the plaintiffs had contracted to sell this soda at an advanced price to a merchant in Russia. The plaintiffs delivered a portion in September and October and the rest was never delivered at all. There was no market for caustic soda in June, July, and August. The plaintiffs had had to pay damages under their sub-contract ; but it was held that they were not entitled to recover such damages, on the ground that they were too remote. The value to the plaintiffs of the goods which were never delivered was taken to be the value of the goods at the time at which they ought to have been delivered, which in the absence of a market price was held to be the price which they could have got for those goods in Russia less the cost of sending them there. This case was followed in principle in *Hinde* v. *Liddell*. (2) The defendant had contracted to supply the plaintiff with 2000 pieces of grey shirting for shipment on October 20. Before that date he informed the plaintiff that he would be unable to complete his contract, and it so happened that grey shirtings of the kind in question could not be procured in the market in England at that time. The plaintiff in fact

(1) 18 C. B. (N. S.) 445. (2) L. R. 10 Q. B. 265.

had entered into a sub-contract to ship the goods in November, and, being unable to find goods of the same quality or to get them manufactured by October 20, he purchased some grey shirtings near the quality contracted for, although of a somewhat superior quality, and for them he had to pay an advanced price. It was held that he was entitled to recover the difference between what he had agreed to pay and what he was compelled to pay for the substituted goods, not however because he had entered into a sub-contract, but because the true measure of damage was the value of the goods at the date of the breach, and that was the price of the best substitute procurable. It should be added that the defendants had been told that the shirtings were for immediate shipment, but nothing was decided as to what the effect of a notice of the sub-contract might have been. (1)

The next case to which I will refer is *Horne* v. *Midland Ry. Co.* (2), in which the matter was elaborately discussed by nine judges in the two Courts. In that case an action was brought against a railway company for failure to deliver a quantity of shoes in London by February 3, 1871. The plaintiffs had sold these shoes at an unusually high price, and they gave the railway company notice of the contract and stated that the goods would be rejected if not delivered on the fixed date; but they did not inform the railway company that the goods had been sold at an exceptionally high price. The goods were not tendered for delivery until February 4 and were rejected by the buyer on that ground, and the question was whether the damages payable by the defendant company were to be measured by reference to the price at which the plaintiffs would have been paid for them on the sub-contracts if delivered in time, or by reference to the market price. It was held that the latter was the true measure of damages, the loss of the exceptionally high price not being such as might reasonably be considered as arising naturally from the defendants' breach of contract or such as might be reasonably supposed to have been in the

(1) L. R. 10 Q. B. per Blackburn J. at p. 270.

(2) L. R. 7 C. P. 583; L. R. 8 C. P. 131.

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contemplation of both parties at the time when they made the contract. It is clear from this case that the Court rejected the view that the damages ought to be based on the footing of the value of the goods to the plaintiff, having regard to his sub-contracts.

These cases led up to the important decision of *Rodocanachi* v. *Milburn*. (1) In that case the plaintiffs had chartered the defendant's ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom, and the plaintiffs had sold the cargo to arrive at a price less than the market value of the goods at the port of discharge at the same time when the cargo should have arrived. The cargo was lost by the negligence of the master, and it was held that in estimating the damages the market value must be looked to and not the price at which the plaintiffs had in fact sold the cargo. Lord Esher M.R., after stating that the measure of damages must be the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods were lost, showed clearly that in his view sub-contracts, whether there was or was not a market value at the port of discharge, were not affected by the price obtained on a sub-contract. "What is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination." I pause here to say that he is considering a case where there has been no proved alteration in the value of the goods between the relevant dates. "If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant,

(1) 18 Q. B. D. 67, 76, 78.

as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods." Lindley L.J. makes a similar statement. "The damages" he says "in such an action are the value of the goods at the port of discharge, minus the accruing freight, and . . . . any contract for sale of the goods made by the charterers, whether at a greater or less price than the market value, is not to be taken into account."

This decision has constantly been cited and always approved. It was expressly approved in the House of Lords in *Williams* v. *Agius*, *Ld.* (1) by Lord Haldane L.C. and Lords Dunedin, Atkinson, Moulton and Parker. That was a case of carriage of coal by sea and failure to deliver, followed by an arbitration, and there had been a sub-contract of sale. Lord Haldane observed, while referring with approval to *Rodocanachi* v. *Milburn* (2): "In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party," and he adds that the law so laid down had not been affected by s. 51 of the Sale of Goods Act, 1893. It is true that in that case there was a market price for the goods, but none of the Lords intimated that the rule of exclusion depended on whether or not there was a market for the particular goods at the port of discharge. The decision of the Privy Council in *Sheik Mohammad Habib Ullah* v. *Bird* (3) supports the view that the exclusion from consideration of sub-contracts does not depend on the existence of a market. In that case there was no market; but Lord Dunedin, delivering the judgment of the Board, observed: "The appellant, however, before the Board, argued that the damages could not be recovered, because, as a matter of fact, the respondents supplied the

(1) [1914] A. C. 510, 520. (2) 18 Q. B. D. 67.
(3) 37 Times L. R. 405.

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sleepers from other wood which they had and made a profit on that supply greater than the profit which they would have made by the contract wood. The answer to this argument is to be found in the well known case of *Rodocanachi* v. *Milburn* (1), which was applied by the House of Lords in the recent case of *Williams* v. *Agius, Ld.* (2) " ; and he cited the passage from the former case which is above set out. In my opinion it is clear from this that Lord Dunedin's view was that the exclusion of intermediate contracts entered into by the plaintiff from a calculation of damages is irrespective of the question whether there is or is not a market for the goods. I should add that the passages cited from *Williams* v. *Agius, Ld.* (3) by my brother Greer show in my view that Lord Dunedin held that opinion when delivering judgment in the House of Lords.

It is, I think, plain from the cases I have cited, as well as from a number of other cases to which I have not referred, that it is unsound to suggest that the true measure of damages is the amount necessary to indemnify the plaintiff against the loss that he has in fact sustained, or the value of the goods *to him* if he has entered into a sub-contract, or in other words that he is entitled to damages on the footing of restitutio in integrum so far as money will put him in that position. This contention was actually argued in the House of Lords case which I have last mentioned, and it was contended that the rule laid down in *Rodocanachi* v. *Milburn* (1) was not the true rule, but this contention was negatived by the House. I do not think the decision of the Privy Council in *Wertheim* v. *Chicoutimi Pulp Co.* (4) can be said to be in conflict with the rule as above stated, since I find this passage : " In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market ; and that, if he wanted to get others in their stead, he could obtain them in that market at that price. In such a case, the price at which the purchaser might in anticipation of delivery have resold

(1) 18 Q. B. D. 67.
(2) [1914] A. C. 510, 520.
(3) [1914] A. C. 510, 522, 523.
(4) [1911] A. C. 301, 307.

the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter : *Rodocanachi* v. *Milburn* (1)."

There is, I think, nothing in *Ströms Bruks Aktie Bolag* v. *Hutchison* (2) which conflicts with the above general rule, for the decision of the House of Lords was based on the view that the proper measure of damages in the circumstances was the cost of replacing at the port of destination the goods which the defendants had neglected to deliver at the time when they should have been delivered, less the value of the goods in Sweden and the amount of the freight and insurance. This amount was greater than the sum paid by the plaintiffs under a sub-contract for sale, and this fact justified a judgment for the sum awarded by the Lord Ordinary as general damages. There is at any rate no hint that *Rodocanachi* v. *Milburn* (1) (relied on there by the respondents) was being in any respect disapproved.

The expressions of opinion in the text-books on this matter, like the oracles of Delphi, are relied on by both sides. As I understand them, they are in favour of the view above expressed. For example, the conclusions arrived at by the learned editor of Benjamin on Sale, 7th ed., at pp. 1018 to 1020, seem to me to be justified by the authorities as they now stand ; and, dealing with the case where there is no market and where the seller at the date of the contract did not know that the goods had been sub-sold or were bought for sub-sale, or would probably be sub-sold, he says that the buyer may buy the best substitute procurable or may charge the seller " the difference between the contract price and the value of the goods as general damages." The passage goes on as follows : " Some evidence of such value is afforded by the sub-sale price, or the price of the goods at the market nearest to the place of delivery, or at a distant market added to the expense of transportation to the place of delivery, or their price at the market in the place of delivery at a time other than that fixed by the contract for delivery." The only criticism I have to make with regard to the passage

(1) 18 Q. B. D. 67. (2) [1905] A. C. 515.

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I have quoted is that I doubt whether the words "were bought for sub-sale or would probably be sub-sold" are sufficiently precise. I suppose most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or are bought for sub-sale, but the authorities seem to show conclusively that something more than that is necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery. Reference may be made to *Grébert-Borgnis* v. *Nugent*. (1) The Master of the Rolls there said that if the sub-contract was not made known to the vendor, the defendant could not be made liable for what the plaintiff had to pay under it, and he proceeded thus: "If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value." He then dealt with the case where the sub-contract was fully made known to the plaintiff, and he said that the cases established that the original vendor was to be liable to so much of the sub-contract as was made known to him, but only to that extent. It is not in dispute that in some cases a sub-contract may afford evidence of "real value," but in my opinion such evidence is of little or no weight if it is proved, as in the present case, that there has been a disastrous drop in the market price of the goods between the date of the sub-contract and the date on which the goods should have been delivered.

Stroud v. *Austin* (2) was a case where the sub-contract was accepted as affording evidence of value at the date of breach. It was an action by a purchaser of English steel rails against the sellers for damages for non-delivery. The contract of sale was dated November 24, 1881, and four days later the plaintiff sold the rails to sub-purchasers in Canada at a price exceeding the contract price by 864*l*. The defendants shipped no rails under the contract, and it was proved that no English

(1) 15 Q. B. D. 85, 89. (2) C. & E. 119.

steel rails could be obtained at New York in bond or at all at the date when the steel rails should have been delivered in New York. Cave J. held that this claim for 864*l.* must succeed, but it is material to note the ground of the decision. He held that the defendants could not be made liable in respect of the sub-purchaser's claim against the plaintiff as they had no notice of the sub-contract, but that he was entitled to what he called "the market price of the English rails in bond [in New York] in February, 1882," and the proof, he said, was that "on November 28 they had been sold at an advance over what the plaintiff had given to the defendants of 864*l.* There has been no sale at all since then, the plaintiff having purchased and held the whole stock of English rails in bond in New York. Now it seems to me the price which was given on November 28 is good evidence of the value at that time, and that in the absence of any evidence to show the price of English rails in bond has gone down, it is also good evidence of the value in 1882." It will be observed that the plaintiff was not given an indemnity, and that the damages were not based upon the footing of the value *to him* of the steel rails, since the defendants were not made liable in respect of the sub-purchaser's claim against the plaintiff. The contract of sub-sale was referred to merely as evidence of the value of the rails in the absence of any evidence of a fluctuation in the market.

It is, however, contended that in the present case the plaintiffs have pleaded in the alternative that the defendants wrongfully converted to their own use the quarters of wheat which were not delivered by the defendants, and it is said that whatever may be the rule with regard to damages founded on contract, in such a case the plaintiffs are entitled, if the action is regarded as one for a tort, to bring into consideration the loss which they have incurred by reason of the sub-contracts which they have not been able to fulfil. I am not satisfied that there was in this case a right of action founded on tort. It may well be that to allow the wheat to become mixed with the barley at some uncertain date in the course of the voyage was a tortious act and would have

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justified an action for conversion; but that is not the tort complained of, which is based simply on the non-delivery of a certain number of quarters of wheat, with the result that the plaintiffs, having refused to accept the mixture, treated the defendants as having failed to deliver the 47 tons in respect of which the reference took place. An action based simply on non-delivery of goods has been hitherto treated as one founded on contract. The question is whether the defendant's acts amounted to an interference, not capable of justification, with the dominion of the plaintiff as the true owner of the goods (*Hollins* v. *Fowler* (1)): see the opinion of Blackburn J. The mere omission or negligence of a carrier is not a conversion: Bullen & Leake, 8th ed., p. 355. An action based simply on non-delivery of goods is one founded on contract: *Fleming* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2) See also Halsbury's Laws of England, vol. 27, p. 892, note *n*, and vol. iv., 2nd ed., p. 95, a title on "Carriers," which has the advantage of being contributed by Lord Wright and Mr. Manningham-Buller.

I am however reluctant to decide the question involved merely on this technical ground, and I will assume that in the present case we are entitled to assess the damage on the footing of a wrongful conversion by non-feasance or negligence of some kind. But is it true to say that the measure of damage which can be assessed against a carrier in such a case differs from that which would be assessed for breach of contract? I am, of course, assuming that the defendant has no notice of any sub-contract by the plaintiff. It is no doubt true that in a case of a claim in tort, damages are constantly given for consequences of which the defendant had no notice. In truth it is immaterial whether or not the damage which flows from his tortious act is such as the wrongdoer might reasonably have anticipated. On the other hand, in tort (as in contract, unless notice to the defendant has affected the matter) the wrongdoer is responsible in damages only for "the natural and direct result of the wrongful act":

(1) (1875) L. R. 7 H. L. 757, 766. (2) 4 Q. B. D. 81.

per Bowen L.J. in *The Argentino* (1); *The Edison* (2), per Scrutton and Greer L.JJ.; and see the speech of Lord Wright in the House of Lords, in which all the Lords concurred. These cases, it is true, were cases of damages due to negligence by a wrongdoing vessel, resulting in the destruction of a vessel engaged in a profit-earning enterprise, and to such cases special considerations apply; but the observations to which I am calling attention have a much wider application.

As I have already indicated, the authorities in disregarding sub-contracts entered into by a plaintiff in actions for non-delivery whether on a sale of goods, or in a case of non-delivery by a carrier, have acted on the ground that the sub-contracts are taken to be accidental circumstances peculiar to the plaintiff. A loss on such sub-contracts is not the natural and direct result of the tortious act, any more than a special loss arising from the impecuniosity of the plaintiff (another circumstance regarded as peculiar to him), which is held to be, to use Lord Wright's phrase in *The Edison* (3), "outside the legal purview of the consequences of these acts."

Turning to the earlier authorities on this part of the case, I may observe that, in the scores of cases which are reported as dealing with the measure of damage in an action against a carrier or in an action founded on failure to deliver goods sold to the plaintiff, there is, so far as I have been able to ascertain, no statement in any judgment that the damages might be higher on the allegation of a tort than they would be in contract. On the contrary, as between seller and buyer it has been decided that the buyer cannot recover larger damages in tort than in contract: see *Chinery* v. *Viall* (4); *Hiort* v. *London and North Western Ry. Co.* (5); and see particularly the judgment of Thesiger L.J. Sect. 51 of the Sale of Goods Act, 1893, shows that that view was accepted by the framers of the Act. (See Chalmers, 11th ed., p. 137; Benjamin on Sale, 7th ed., p. 984, note *x*.)

(1) 13 P. D. 191, 200, 201.
(2) [1932] P. 52, 62, 64, 69; [1933] A. C. 449, 459, 460.
(3) [1933] A. C. 449, 460.
(4) (1860) 5 H. & N. 288.
(5) (1879) 4 Ex. D. 188, 199.

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I find in Mayne on Damages, 10th ed., p. 40, the statement that in cases of tort to property where there are no circumstances of aggravation, the damages are generally the same as in cases of contract. It has been held repeatedly that in trover the measure of damage generally speaking is the value of the goods. As an illustration of this it should be observed that in *The Parana* (1) the claim was for damage arising from breach of contract to deliver goods shipped, the default being due to defects in the ship, and it was held that the plaintiffs could not recover damages based on a claim for loss of market.

A few years later a somewhat similar case was brought in connection with *The Notting Hill* (2), but in this case the claim was made in tort and not in contract. The judgments in the Court of Appeal—Sir Wm. Brett M.R., Bowen and Fry L.JJ.—decided that the rule with regard to remoteness of damage was precisely the same whether the damages were claimed in actions of contract or of tort, and they followed the decision in *The Parana*. (1) The judgments of Bowen L.J. in *Cobb* v. *Great Western Ry. Co.* (3) and in *The Argentino* (4), and of Scrutton and Greer L.JJ. in *The Edison* (5) are to the same effect. To avoid misconception, I would add that I am dealing only with the case of an action in trover where there are no circumstances of aggravation and where though technically the facts may be held to amount to conversion by the defendant to his own use, yet the real ground of the action is breach of contract to deliver.

France v. *Gaudet* (6) was, however, relied on by the plaintiffs. That was an action for the wrongful conversion to their own use by the defendants of 100 cases of champagne. This wine had been bought at the price of 14*s*. per dozen, and had been immediately resold by the plaintiff to a Captain Hodder, whose ship was on August 13 in the London Docks and about to sail. The sale was for delivery on the following day, August 14, but when the plaintiff sent to the defendants'

(1) (1877) 2 P. D. 118.
(2) (1884) 9 P. D. 105.
(3) [1893] 1 Q. B. 459, 464.
(4) 13 P. D. 191.
(5) [1932] P. 52.
(6) L. R. 6 Q. B. 199, 204.

wharf and required the delivery of the wine, the defendants refused to deliver it on an untenable ground, and Captain Hodder sailed without the wine. It was admitted that champagne of that peculiar brand and quality was not to be bought in the market so as to enable the plaintiff to substitute other cases of champagne for the 100 cases which he had purchased and contracted to sell to Captain Hodder. The defendants, however, had no notice of the contract between the plaintiff and Hodder, and the question for the Court of Appeal was as to the measure of damage. The material part of the decision of the Court, delivered by Mellor J., was in the following terms: "We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion, and that a bona fide sale having been made to a solvent customer at 24*s.* per dozen, which would have been realised had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24*s.* per dozen; and we think that, in the present case, that ought to be the measure applied, and that a jury would not only have been justified in assuming that to be the value, but ought, where the transaction was bona fide, to have taken that as the measure of damages." The judgment goes on to state grounds for the conclusion that notice of a special contract is not necessary in such a case, the defendant being ex hypothesi a wrongdoer, and this passage might be thought to have given some ground for the contention that in such a case as we are considering, the measure of damage should be greater if the action can be brought in tort rather than in contract. It is, however, to be noted that Mellor J. himself explained the case in *Horne* v. *Midland Ry. Co.* (1) Counsel for the plaintiffs were arguing that the loss of profit on a contract of sub-sale might be taken into account, and they relied on *France* v. *Gaudet* (2); but Mellor J. remarked: "That case was peculiar. Champagne of a similar quality was said not to be procurable in the market. There was, therefore, no other test of the value of the goods." Having regard to this

(1) L. R. 8 C. P. 131, 132. (2) L. R. 6 Q. B. 199.

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statement I can see no ground for doubting that the damages recoverable in *France* v. *Gaudet* (1) were based on the price obtainable on the sub-sale on precisely similar grounds to those which, as I have stated above, were accepted in *Stroud* v. *Austin*. (2)

My conclusion is that whether the action is in tort or contract, whether there is or is not a market for the same goods at the port of discharge, circumstances peculiar to the plaintiff, such as a sub-contract by him not communicated to the defendant, must be excluded from consideration, although in a proper case such a sub-contract, like any other contract of sale at a relevant date, might be used as evidence of value. The sub-contracts in the circumstances of the present case are in my view valueless as evidence of value.

There remains the question of fact as to the true value on the evidence of the 47 tons of Roumanian wheat on or about January 10, 1931. On careful consideration I have come to the same conclusion as Greer L.J. on this question—namely, that the value has been shown to be 23*s*. 6*d*. per quarter. I therefore agree with the order on the appeal which has been proposed by my brother Greer.

Solicitors for the appellants : *Thomas Cooper & Co.*

Solicitors for the respondents : *Pritchard, Sons, Partington & Holland, for Andrew M. Jackson & Co., Hull.*

(1) L. R. 6 Q. B. 199. (2) C. & E. 119.

E. C. M. T.

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2 K.B. (p. 361 to p. 536): P. (p. 169 to p. 236).

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[*For Names of Editors and Reporters see Inside.*]

PUBLISHED by THE COUNCIL at its office, 30, MONTAGUE STREET, LONDON, W.C.1,

AND

Printed by WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C.2.

"THE LAW REPORTS, 1934," for November, consist of—

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